Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

THE ESTATE OF ROGER ROXAS AND
THE GOLDEN BUDHA CORPORATION,
Petitioners,

v.

MARIANO J. PIMENTEL, on behalf of himself
and all other persons similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL C. CATHCART
Counsel of Record
LADELL HULET MUHLESTEIN
MAGAÑA, CATHCART & McCARTHY
1801 AVENUE OF THE STARS, SUITE 600
LOS ANGELES, CA 90067-5801
(310) 553-6630
(310) 407-2295 FAX

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the court exceeded federal court jurisdiction and invaded state probate court function when, after it determined assets to be the property of the Estate of former President, Ferdinand Marcos, it took control of the estate assets, determined priority among claimants to estate assets, and ordered distribution of estate assets to a claimant?

2. Whether the Estate is an indispensable party to an action to distribute assets of the Estate, such that the court lacked authority to entertain the action?

3. Whether the court violated the jurisdictional requirements of the interpleader statute when it granted judgment to a party that lacked adversity as to the fund and the other claimants because it presented no ownership or lien claim against the fund?

4. Whether the Ninth Circuit Court of Appeals violated Petitioners' right to appeal when it failed to mention in its Opinions and Orders Petitioners' claims of error, their merits or lack thereof, offer analysis or cite authority, or rule on any of Petitioners' assertions of error?

PARTIES TO THE PROCEEDINGS
Rule 14.1(b)

The parties to these proceedings include the following: The Estate of Roger Roxas; The Golden Budha Corporation; Republic of the Philippines; Presidential Commission on Good Government;[1] Philippine National Bank; and the class of human rights victims represented by Mariano J. Pimentel.

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[1] Republic of the Philippines and Presidential Commission on Good Government successfully asserted sovereign immunity and were dismissed from the action.

RULE 26.9 STATEMENT

The Golden Budha has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners The Estate of Roger Roxas and The Golden Budha Corporation respectfully petition for a Writ of Certiorari to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on September 12, 2006.

OPINIONS BELOW

The original Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix (hereinafter "App.") p. 30a) was entered on May 4, 2006, and is reported at 446 F.3d 1019 (9th Cir. 2006). A subsequent Opinion of the United States Court of Appeals for the Ninth Circuit (App. p. 14a) was filed on September 12, 2006, and is reported at 464 F.3d 885 (9th Cir. 2006). A timely Petition for Rehearing was denied on November 3, 2006, and is reported at 467 F.3d 1205 (9th Cir. 2006). (App. p. 1a).

JURISDICTION

The judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on May 4, 2006 and amended on May 9, 2006. A timely Petition for Rehearing was filed and the Ninth Circuit's subsequent Opinion was entered on September 12, 2006. A timely Petition for Rehearing was denied on November 3, 2006. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1335 of 28 U.S.C. states:

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $ 500 or more, or having issued a note, bond, certificate, policy of insurance or other instrument of value or amount of $ 500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $ 500 or more , if

(1) Two or more adverse claimants, of diverse citizenship as defined in subsection (a) or (d) of section 1332 of this title [28 USCS § 1332], are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety and the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

STATEMENT OF THE CASE

Facts: <u>The Discovery and Theft of the Yamashita treasure, Imprisonment and Torture of Roxas</u>

Rogelio ("Roger") Roxas obtained a permit from the Philippine government to search for treasure. In 1970 he organized a group and hired laborers to search for the "Yamashita Treasure," reported to have been looted by Japanese troops in Southeast Asia during World War II and buried in tunnels in the Philippines. After approximately seven months Roxas located a system of tunnels, inside of which they discovered Japanese artifacts, a gold Buddha, approximately three feet in height which weighed an estimated metric ton, and over 1000 boxes containing bars of gold. The head of the Buddha was detachable. Inside the chest cavity were three handsful of diamonds. After removing the Buddha and some smaller gold bars to his home, Roxas blasted the tunnel closed while he attempted to sell the Buddha to finance removal of the gold.

At 2:30 in the morning on April 5, 1971, the day after a purchaser identified with the Marcos family was to have returned to purchase the Buddha, armed men from Philippine national security agencies, broke the windows of the Roxas home, pointed rifles inside and threatened to shoot if the door was not opened. The men beat Roxas' brother, ordered the family to the floor and took the Buddha, diamonds, and bars of gold. Roxas and his family went into hiding.

In May 1971 Roxas was arrested by men connected with President Marcos. He was taken to a military camp where he was beaten, threatened and tortured with electrical shocks and burning cigarettes. After two weeks of torture he escaped and went into hiding for almost a year.

When he returned to his home in July 1972, he was again arrested by Marcos thugs. He was held in prison until November 1974. Between 1974 and 1975, after the imposition of martial law, soldiers removed the boxes of gold from the tunnel site. See *Roxas v. Marcos*, 89 Ha. 91 (1998); *Roxas v. Marcos*, 969 P.2d 1209 (Hawaii 1998); and Petitioners' offer of proof in the district court, which due to its volume is not included in the appendix.

The Interpleaded Fund

In September 1972 Ferdinand Marcos created Arelma, S.A.,[2] a Panamanian corporation, which in turn funded securities account No. 165-07312 with Merrill, Lynch, Pierce, Fenner & Smith, Incorporated (hereinafter "Merrill Lynch"). (Finding of Fact 9-14, App. pp. 53a-54a).

At his deposition, forensic accountant John F. Buckley, who reviewed Marcos' financial records on behalf of the Philippine government, testified that Marcos did not have legitimate means to amass great wealth and that Buckley and the Philippine Presidential Commission On Good Government determined that the money which funded the Merrill Lynch account was ill-gotten. He further testified that the most probable source of Marcos' wealth was the treasure stolen

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[2] Named in this action as Arelma, Inc. (hereinafter "Arelma").

from Roxas, and that Marcos engaged in a pattern of concealing wealth by use of dummy corporations.[3]

Procedural Background:

The State Court Judgment

Roger Roxas and the Golden Budha Corporation[4] sued Ferdinand and Imelda Marcos in Hawaii state court in February 1988. *Roxas v. Marcos, Civil No. 88-0522-02.* Ferdinand Marcos died in September 1989. Imelda Marcos was substituted as representative of the Estate of Marcos. Roger Roxas died on May 25, 1993, the day set for trial. A personal representative was substituted in his place. Trial began in June of 1996. Judgment was entered against the

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[3] The District Court excluded Buckley's testimony on the ground that he had not provided an expert report, despite the fact that he was a non-retained percipient witness expert who formed his opinions regarding Marcos' assets in the course of employment as a forensic accountant tracing Marcos assets on behalf of the Philippine government years earlier, and therefore was not required to submit a report, and despite the fact that there was no prejudice to the parties inasmuch as Buckley provided documentation he prepared in the course of his employment with the Philippine government, and was fully deposed and testified to all of the opinions offered at trial and that opposing counsel declined an invitation to redepose the witness, well in advance of trial, if they felt they had been disadvantaged by the absence of a report. See Petitioners' Opening Brief. pp. 8-11 App. pp. 73a-77a

[4] The treasure was assigned by Roxas to The Golden Budha Corporation.

Estate of Marcos[5] in the amount of 43 billion dollars in favor of The Golden Budha Corporation for the value of the stolen treasure and in the amount of $6 million in favor of the Estate of Roger Roxas as damages for his torture and imprisonment. See *Roxas v. Marcos*, 89 Ha. 91, 969 P.2d 1209 (Hawaii 1998). It was the largest civil verdict ever awarded, before it was reduced on appeal. The $6 million judgment in favor of the Estate of Roxas was upheld. The judgment in favor of The Golden Budha Corporation for conversion (limited after appeal to that part of the treasure stolen from the Roxas home) was reduced to $13.25 million after retrial. *Roxas v. Marcos*, Civil No. 88-0522-02. The Roxas claimants' constructive

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[5] The Hawaii Supreme Court held that the substitution of Imelda as representative of the Estate was invalid because she had never been formally appointed by a court as administratrix of the estate, although she had been acting in that capacity. The judgment against the Estate of Marcos was altered to name Imelda Marcos in her personal capacity to the extent of her interest in the estate. In its Opinion the Hawaii Supreme Court stated that "If, in fact, she had been named executrix and personal administrator prior to the present appeal . . . this court would not disturb her substitution pursuant to HRCP Rule 25(a)(1) or her designation as the personal representative of the Marcos Estate." Despite the fact that it was determined that Imelda Marcos had, in fact, been appointed administratrix of the Estate of Marcos by a Filipino Court, the invalidation of the substitution was upheld on appeal on a subsequent appeal. Ha. Supreme Court No. 24605 (2005) App. p. 47a.

The substitution was made pursuant to Hawaii Rule 25, which is identical to Federal Rule 25. The identical stipulated substitution was upheld in the Ninth Circuit in the class action litigation and underlies the Pimentel claimants' judgment against Estate of Marcos, pursuant to which judgment was entered in their favor. *Hilao v. Estate of Marcos*, 103 F.3d 762, 766 (9th Cir. 1996);

trust claim for the remainder of the treasure taken from the tunnels is still pending in Hawaii state court. *Id.*

The District Court Judgment

This matter was tried as an interpleader action before Judge Manuel Real in Hawaii district court. The New York Merrill Lynch account was deposited with the court in Hawaii. The claimants were: The Estate of Roger Roxas and The Golden Budha Corporation (hereinafter sometimes referred to as "the Roxas claimants"), holders of a judgment in their favor for theft by Marcos, who claim entitlement to the fund as the owners of the stolen assets Marcos used to fund the account; Arelma, which claims ownership of the account; The Philippine National Bank claiming on behalf of the Philippine government and as the bank holding bearer shares of Aremla; the Republic of the Philippines and the Presidential Commission on Good Government, who claim ownership on the part of the government;[6] and Mariano J. Pimentel, representative of a class of individuals who were the victims of various torts committed against them under the Marcos administration (hereinafter "Pimentel or Pimentel claimants"). They do not claim ownership of the fund. Their claim is based on their status as judgment creditors of Marcos. See *Merrill, Lynch vs Arelma* United States District Court For The District of Hawaii, Case No. CV 00-595-R.

Among other findings of fact, the district court made a determination that Ferdinand Marcos was the source of the funds in the Merrill Lynch account. The district court entered

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[6] The Republic of the Philippines and the Presidential Commission on Good Government successfully asserted sovereign immunity and were dismissed from the action.

judgment in favor of Pimentel and directed the Clerk of the Court to transfer those assets to an account, in the custody of the Clerk's Office, which account had been established in the Pimentel claimant's class action, which was also tried in front of Judge Real. Conclusion of Law 22, App. p. 64a. The Ninth Circuit ordered the fund maintained until final judgment in that action. Conclusion of Law 22, App. p. 64a.

Proceedings Before The Ninth Circuit

The Estate of Roger Roxas and The Golden Budha Corporation appealed to the Ninth Circuit, as did Republic of the Philippines and Philippine National Bank. On appeal Petitioners raised dispositive, jurisdictional issues, including three grounds on which the court lacked jurisdiction to distribute assets of the estate. The Ninth Circuit's Opinion of May 4, 2006 (App. p. 30a) affirmed the judgment of the district court, as modified to allot to Roxas a share of the assets no greater than that of any class member.[7] The Opinion did not address Petitioners' assertions of error and cited no authority for its novel result, drafting, without notice, Petitioners into the class, of which they were not members. Petitioners petitioned the Ninth Circuit for rehearing, asserting both the jurisdictional arguments and that the Opinion was so incomplete as to deprive them of their right of appeal. Petition for Panel Rehearing and Rehearing *En Banc* below. The Ninth Circuit's revised Opinion of September 12, 2006 (App. p. 14a) did not address any of the jurisdictional issues. Petitioners petitioned the Ninth Circuit for rehearing

[7] The Ninth Circuit's Order Amending Opinion does not concern Petitioners or their arguments.

again, again raising the jurisdictional issues and right to appeal issues. The court denied the petition. (App. p. 1a).

Statement of Lack of Jurisdiction:

Petitioners contend that there was no basis for federal jurisdiction of this action in the district court, inasmuch as the case required the performance of probate functions by the federal court, which is an impermissible invasion of the probate function reserved to state probate courts, and because the federal court had no jurisdiction in the absence of the Estate of Marcos, an indispensable party, which was not a party to the action.

Petitioners further contend that the federal court had no jurisdiction of Mariano J. Pimentel, the class representative, to whom the court awarded the interpleaded fund, under the interpleader statute at 28 U.S.C. § 1355, pursuant to which the district court purported to take jurisdiction (Conclusion of Law 2, App. p. 60a), inasmuch as Pimentel lacked adversity as to the interpleaded fund and as to the other parties, which adversity is prerequisite to interpleader jurisdiction of the party.

REASONS FOR GRANTING PETITION

The order of the district court distributing assets belonging to the Estate of Ferdinand Marcos exceeded the jurisdiction of the federal courts, violated the due process rights of the Estate, and violated the jurisdictional requirements of the interpleader statute. Consideration of these arguments was required of the Ninth Circuit, both because they are fundamental to the right of the federal courts to entertain this action, and because they were raised by Petitioners in an appeal permitted by law as of right. In light of the important

question of federal jurisdiction, the inconsistent position of the Ninth Circuit relative to the other Circuits and the Supreme Court of the United States with respect to recognition of the probate exception to federal court jurisdiction, and the importance of the right to appeal to individual litigants and to the perception of fairness in the judicial system, the Petition should be granted.

I. FEDERAL COURTS LACKED JURISDICTION TO DISTRIBUTE THE ESTATE ASSETS TO PIMENTEL.

There are three grounds on which the district court lacked jurisdiction to distribute the fund to the Pimentel claimants. First, federal courts are prohibited from taking control of estate assets, determining priority among competing claims against the estate, and ordering distribution of estate assets. Second, the district court lacked jurisdiction of the action in the absence of the Estate, which is an indispensable party to an action concerning the disposition of estate assets. Third, the court lacked jurisdiction of Pimentel, the party to whom it awarded the fund, because the Pimentel claim did not meet the jurisdictional requirements of the interpleader statute, in that Pimentel lacked adversity as to the fund and the other parties.[8]

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[8] There is yet another ground pursuant to which the district court is prohibited from distributing the fund to the Pimentel claimants. HRS § 657 sets out a 10 year statute of limitations within which a judgment must be enforced. The Pimentel judgment was entered on February 3, 1995.The statute expired on February 3, 2005, during the pendancy of this action in the district court. No extension was requested until after the statutory period had expired. See counsel's letter of December 7, 2006 to the Clerk of the District Court, so advising the court. App. p. 98a.

A. Distribution of Estate Assets is an Impermissible Invasion of the Probate Function, which is Reserved to State Probate Courts.

The district court made a finding of fact that the Merrill Lynch account was funded by Marcos.[9] The fund has been considered at all times as an asset of Marcos' Estate. The Pimentel claim, in fact, is based upon a judgment against the Estate of Marcos. The district court took control of the estate asset.[10] The district court entertained competing claims of multiple claimants to the estate asset and determined priority among them.[11] Finally, the district court issued an order to pay the estate asset to a judgment creditor of the Estate.[12] These actions constitute an impermissible invasion of the probate function by the federal court, contrary to controlling United States Supreme Court case law.

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[9] The district court found that Ferdinand Marcos was the source of the funds in the Merrill Lynch account. Findings of Fact 14, 23; Conclusions of Law 14, 20, App. pp. 63a-64a.

[10] Finding of Fact 16, App. p. 54a.

[11] The district court found that the claim of The Golden Budha Corporation is "junior" to the claim of the Pimental claimants. Finding of Fact 38. The court found that the claim of Arelma is "subordinate" to the claim of the Pimentel claimants. Conclusion of law 21, App. p. 64a.

[12] The district court found that the Pimentel claimants are entitled to the entirety of the interpleaded assets and directed the Clerk of the Court to transfer those assets to the account in the Clerk's Office established in the original class action case (which was also heard before Judge Real), pursuant to the final judgment in that action. Conclusion of Law 22, App. p. 64a.

In *Sutton v. English*, 246 U.S. 199, 205, 38 S.Ct. 254 (1918) the Supreme Court articulated what is known as the probate exception to diversity jurisdiction in the federal courts. The Court declared:

> By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents *in rem*, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States . . . ." (Emphasis added.)

A federal court may entertain an action which has as its sole purpose the establishment of a claim against an estate, but it is only the question of debt or no debt against the estate which may be heard by the federal courts. *Galion Iron Works & Mfg. Co. v. Russell*, 167 F. Supp. 304, 309-310 (W.D. Ark. 1958). In *Yonley v. Lavender*, 88 U.S. 276, 279-280 (1874) the Supreme Court held that a creditor may secure a judgment against an administrator in a federal court and, based on that judgment, claim the amount awarded to creditors of his class in probate court, but he cannot secure an execution of that judgment and take precedence over other creditors in a federal court. The Supreme Court reiterated in *Byers v. McAuley*, 149 U.S. 608, 620, 13 S.Ct. 906 (1893) (emphasis added):

> "A [claimant] . . . may establish a debt against the estate. [Citations omitted.] But the debt thus established must take its place and share of the estate

> as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent."

In *Pufahl v. Estate of Parks*, 299 U.S. 217, 226, 57 S.Ct. 151 (1936) the Supreme Court identified specific matters which constitute "strict" or "pure" probate which are reserved to state probate courts.

> [A claimant against an estate] may not be denied his right to prosecute an action to judgment or a suit to final decree in the federal court, such judgment or decree can do no more than adjudicate the validity and amount of his claim. The marshaling of that claim with others, its priority, if any, in distribution, and all similar questions are for the probate court upon presentation to it of the judgment or decree of the federal court. (Emphasis added.)

See also, Dannhardt v. Donnelly, 604 F. Supp. 796, 800 (E.D. N.Y. 1985) (orders to pay plaintiff the assets of the estate were "obviously matters which fall exclusively within the probate jurisdiction of the [state probate court] and over which the Court lacks subject matter jurisdiction"). Rarely is a federal court called upon to perform pure probate functions. However, because of the parallel purpose and structure of interpleader proceedings and probate proceedings, in which claimants are gathered to contest distribution of assets controlled by the court, when the assets held by an interpleader court are assets of an estate, that is exactly what happens.

Neither the form of the case as an interpleader action nor court control of probate assets nullifies the probate exception. As the Supreme Court explained:

> Possession of the *res* draws to the court having possession all controversies concerning the *res*. If original jurisdiction of the administration of the estates of deceased persons were in the Federal court, it might by instituting such an administration . . . draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person. It did not in this case assume to take possession of the estate in the first instance, and it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it.

Byers v. McAuley, supra, 149 U.S. at 618-619 (emphasis added).

As *Byers* states, a federal court will not entertain an action if the relief requested might have the practical effect of drawing possession of a probate res to the federal court. *See also,* 13B C.Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* § 3610 at pp. 490-491 (3d ed. 2001). The functions the federal court undertook in this interpleader action fall squarely within the realm of pure probate matters of which the federal courts have no jurisdiction.

Even when the matters are only ancillary to probate, if state law provides for exclusive jurisdiction of the matter in probate court, there is no federal jurisdiction. The application of the probate exception to matters ancillary to probate was thoroughly analyzed by Judge Posner in *Dragon v. Miller*, 679 F.2d 712 (7th Cir. 1982), *cert den.*, 459 U.S. 1017. The probate exception should be applied to bar jurisdiction of probate-related matters, Judge Posner wrote, when probate

jurisdiction will promote legal certainty, judicial economy, and take advantage of relative expertness. *Id.* at 714-715. The *Dragon* court declared that the judicial economy factor argues very strongly for confining the lawsuit to state court when a state has created a specialized cadre of judges or provided that certain issues may be raised only in probate proceedings. *Id.* at 715-716. When state courts have a measure of exclusive jurisdiction, the federal courts will have less experience in adjudicating the issues than the state probate courts, which factor also weighs against federal jurisdiction. *Id.* at 714-715.

Even assuming that this action were only ancillary to probate functions, federal jurisdiction would still be barred in favor of jurisdiction in state probate court. Each of the three factors identified by Judge Posner favors state probate court jurisdiction of this action. First, legal certainty always favors limiting probate-related matters to probate courts. Secondly, judicial economy favors probate jurisdiction. Both Hawaii and New York (the potential sites for probate of these assets) have created specialized probate courts to which state law grants exclusive jurisdiction.[13] Thirdly, the exclusive

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[13] Hawaii's probate statute, found at HRS §§ 560:1-101 to 560:8-102, provides that the state court sitting in probate has "exclusive jurisdiction of formal proceedings to determine how decedents' estates . . . are to be administered, expended and distributed." HRS § 560:3-105 (emphasis added). "All proceedings and actions to enforce a claim against the estate are governed by the [probate] procedure. . . ." HRS § 560:3-104 (emphasis added). Proceedings under the Hawaii probate code are exempted from the operation of the Hawaii Rules of Civil Procedure and are governed by a separate system of rules. Hawaii Rules of Civil Procedure 81(a)(1).

New York has established the distinct Surrogate's Court, for

jurisdiction of Hawaii and New York probate courts creates relative expertise on the part of its probate judges.[14] This is particularly the case when, as in Hawaii and New York, the state court has also created a separate system of rules by which probate proceedings are governed. *See* footnote 10.

Additional considerations of fairness underlie the probate exception. The Supreme Court has declared that to allow distribution of estate assets outside of probate proceedings would nullify the administration laws of the State, give creditors who could sue in federal court greater privileges in the distribution of estates than creditors who could not, place the judgments of the federal court on a higher grade than the judgments of the state court, creating conflict, and render the state powerless in a matter over which it has confessedly full control. *Yonley v. Lavender, supra,* 88 U.S. at 279-280. Such evils as the Supreme Court anticipated are more than hypothetical. Parties can deplete the Estate by means of

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the handling of all probate matters within the state, procedure for which is set forth in the Surrogate's Court Procedure Act, New York Statutes §§ 101 et seq. Section 201.3 of the Act provides, "The court shall continue to exercise full and complete general jurisdiction in law an in equity to administer justice in all matters relating to estate and the affairs of decedents, and . . . to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party and any other person having any claim or interest therein. . ." (Emphasis added.)

[14] An example of the lack of expertise in issues related to the distribution of an inadequate fund among competing claimants by the district court is its decision, in the May 4, 2006 Opinion, to award the fund to individuals holding the two judgments on a per capita, rather than a pro rata basis based on the judgments. May 4, 2006 Opinion, pp. 5041, 5042, Ap. p. 44a-46a.

piecemeal interpleader cases each time a Marcos asset surfaces, while parties who are not named in the interpleader cases or who face barriers to federal court litigation are frozen out. Cases are pending or have been heard in district court in Texas,[15] Colorado, [16] and New York[17] involving the Pimentel claimants and others and alleged Marcos Estate assets.

The probate exception to federal jurisdiction applies to bar jurisdiction of this action in which the court undertook pure probate functions. Even had the case concerned merely ancillary probate-relate matters, the probate exception would apply to bar jurisdiction because of the existence of exclusive, specialized state probate systems. Where federal court jurisdiction does not exist, the action must be dismissed. *Mackey v. Pheil,* 827 F.2d 540, 543 (9th Cir. 1987).

B. The Estate is an Indispensable Party to an Action to Distribute Estate Assets.

The Estate of Marcos is an indispensable party to this action under Federal Rules of Civil Procedure Rule 19(b), without whom this action to distribute estate assets cannot be conducted. The factors to be considered in a determination of whether a party is indispensable to the action under Rule 19(b) include: first, to what extent a judgment rendered in the

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[15] (Mariano Pimentel v. B. N. Development, United States District Court for the Northern District of Texas, Ft. Worth Division, case number: C.A. No. 4-05CV-234-y.)

[16] (Pimentel vs. Denman United States District Court for the District of Colorado Case no.1:05-cv-00702-MSK-MEH

[17] (Philippines et al vs. Christies United States District Court for the Southern District of New York. Case 1:98-CV-03871)

party's absence might be prejudicial to it or other parties; second, the extent to which, by protective provision in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the party's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. Each of the factors of rule 19(b) supports the conclusion that the Estate is an indispensable party, such that this action cannot be conducted without its participation.

An action to disperse the assets of the Estate in its absence is, of course, prejudicial to the right of the Estate to participate in an action upon its property. No provision respecting the distribution of estate property to a claimant could lessen the prejudice to the absent Estate. A judgment against the Estate cannot be enforced in an action to which the Estate is not a party. Plaintiffs (in this case, claimants) have a completely adequate remedy in probate court if the action is dismissed. In order for a just disposition of estate assets, the Estate must participate. The assets of the Estate cannot be distributed piecemeal in federal court proceedings in the absence of the Estate as a party. The dispute over this fund belongs in probate court where all claimants may present their claims, and where there will be no issue respecting indispensability, either as to the Philippine government or the Estate.

C. Pimentel Lacks the Jurisdictionally Required Adversity for an Interpleader Claim.

The district court purported to take jurisdiction of this matter pursuant to the interpleader statute at 28 U.S.C.

§ 1335.[18] Conclusion of Law 2, App. p. 60a. Adversity, both as to the fund and between the claimants, is a jurisdictional requirement of interpleader. If either aspect of adversity is lacking, the non-adverse claim must be dismissed. *Gaines v. Sunray Oil Co.*, 539 F.2d 1136, 1142, 1443 (8th Cir. 1976); *Industrial Bank of Washington v. Techmatics Technologies, Inc.*, 763 F. Supp. 629, 634 (D.Dist.Col. 1991), *affd* 955 F.2d 764 (D.C. Cir. 1992).

In interpleader actions the subject matter of the action is not a set of facts, a transaction or other occurrence, but a specific identified fund or property. If a claimant does not assert an ownership or lien interest in the particular interpleader fund, its claim is not adverse to the fund and must be dismissed. *Northern Natural Gas Co. v. Grounds*, 292 F. Supp. 619, 640 (D. Kan. 1968), *affd in part, reversed in part on other grounds* 441 F.2d 704 (10th Cir. 1971). "[T]he dispute cannot involve money generally, as most disputes do, but must involve a specific fund of money and competing claims for that fund." *American Family Mut. Ins. Co. v. Roche*, 830 F. Supp. 1241, 1245 (E.D. Wis. 1993). A claimant in an interpleader action must assert a prior right, by title or lien, to the disputed fund. *Center Partners Management Ltd. v. Cache, Inc.*, 675 F. Supp. 48, 49 (S.D.Fla. 1986). A claim for damages is not a claim of

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[18] The district court also purported to take jurisdiction pursuant to 28 U.S.C. § 1655 and quasi in rem and in rem jurisdiction. Conclusion of Law 2, App. p. 60a. 28 U.S.C. § 1655 does not confer independent jurisdiction. *Georgia Central Credit Union v. Martin G.M.C. Trucks, Inc.*, 622 F.2d 137, 138 (8th Cir. 1980). Interpleader actions are in personam, not in rem, proceedings. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518, 521, 36 S.Ct. 613 (1916). There is no jurisdiction under the alternative grounds recited by the district court.

ownership or lien interest in a particular fund and therefore is not an adverse claim against the fund. *Id.* at 48, 49-50. A general judgment against the owner or holder of the fund is not a claim against the stake. *Airborne Freight Corp. v. United States,* 195 F.3d 238, 240, 241-242 (5th Cir. 1999); *RubinBaum LLP v. Related Corporate Partners V,* 154 F. Supp. 481, 487 (S.D. N.Y. 2001).

The Pimentel claimants do not assert an ownership or lien interest in the fund. Their claim rests upon a judgment for torts committed on them, which has no direct tie to the money, and thus may be satisfied with any money or property legally belonging to Marcos.

Nor does the Pimentel claimants' claim meet the requirement that it be adverse to the claims of the other claimants. The interpleader mechanism was devised to protect a stakeholder from double liability on a single obligation, as a result of adverse claims against the stake it holds. *Alfa Financial Corp. v. Key,* 927 F. Supp. 423, 428, 429 (M.D. Ala. 1996); 7 Wright & Miller, *Federal Practice and Procedure* § 1704 (1972). The stakeholder must be subject to multiple conflicting claims against the fund for interpleader to serve its purpose. *Gaines v. Sunray Oil Co., supra,* 539 F.2d at 1141. To be adverse to the other claims, a party's claim must present a genuine threat against the fund, be asserted against the same fund as the other claims, and be based upon a theory inconsistent with the theories of the other claims. *General Electric Credit Corp. v. Grubbs*, 447 F.2d 286, 288 (5th Cir. 1971); *Alfa Financial Corp. v. Key, supra,* 927 F. Supp. at 428-429; *Northern National Gas Co. v. Grounds, supra,* 292 F. Supp. at 640. The Pimentel claim fails to meet any of the three prongs of the party adversity requirement.

The threat of double liability occurs if, were the funds paid to one claimant, another could sue the stakeholder for having paid the fund to the wrong party. *Indianapolis Colts v. Mayor and City Council,* 733 F.2d 484, 486 (7th Cir. 1984); *RubinBaum LLP v. Related Corporate Partners V, supra,* 154 F. Supp. at 487. Where the stakeholder has no obligation to the claimant, there is no risk of double liability to the stakeholder. In *Bank One, Texas, N.A. v. Taylor,* 970 F.2d 16 (5th Cir. 1992), *cert denied* 508 U.S. 906, 113 S.Ct. 2331, the court observed that, for purposes of determining whether the bank faced rival claims to an account, absent an agreement, the bank owned no duty to the claimant and was not required to recognize his putative claim to funds held by the bank. The bank, therefore, failed to meet the first requirement for instituting a proper interpleader action. *Id.* at 24. The only liability or obligation on the part of a stakeholder is to satisfy claims against the stake itself. Because the Pimentel claim is based on a judgment against Marcos, not a claim against the fund, Merrill Lynch has no obligation to the Pimentel claimants and does not face the possibility of liability to them. Nor is there a risk to the stakeholder when the claim asserted is against a fund different from the fund the stakeholder holds. The claim must be asserted against the particular stake deposited with the court. The Pimentel claimants' judgment is against Marcos, not this fund. It is not adverse to the Roxas claim of ownership of the interpleaded fund or to the Arelma/Philippine National Bank claim of ownership of the interpleaded fund. The Pimentel claimants can satisfy their judgment against Marcos without disturbing the interpleaded funds. Their claim is not adverse.

The requisite adversity is present when the stakeholder is faced with two or more claims which are mutually inconsistent, when of multiple demands, the fund is subject to only one. There is danger of unfair double liability on the

part of the stakeholder only in cases where only one party is entitled to succeed. *Texas v. Florida,* 306 U.S. 398, 406, 412, 59 S.Ct. 563, 568, 570 (1939); *General Electric Credit Corp. v. Grubbs,* 447 F.2d 286, 288, 289 (5th Cir. 1971).

The Roxas claimants assert an ownership interest in the interpleaded fund. So does Arelma/Philippine National Bank. These ownership claims are mutually inconsistent. Only one party can own the fund. The Pimentel claimants, however, assert a claim for recovery as holders of a general judgment against Marcos. The Pimentel claim is not adverse to the claims of the other claimants because the theories of recovery are not mutually inconsistent. In the event that Merrill Lynch dispersed the fund to the Roxas claimants or Arelma/Philippine National Bank, the Pimentel claimants would simply seek satisfaction of their judgment against Marcos elsewhere. They would not be foreclosed by disbursement of the fund, nor could they sue Merrill Lynch, because they have no claim directly against this fund. The Pimentel claimants are non-adverse both as to the fund and as to the parties. Pimentel is not a proper party and must be dismissed from the interpleader case. Where a plaintiff cannot establish adversity as to one of several claimants, that claimant will be dismissed from the interpleader case. *Gaines v. Sunray Oil Co., supra,* 539 F.2d at 1442, 1443.

Petitioners' claim, on the other hand, is based on the conversion portion of its judgment and on the pending constructive trust claim. A claim need not be reduced to a judgment to be cognizable in an interpleader action. *State Farm Fire & Casualty Co. v. Tashire,* 386 U.S. 523, 531-532, 87 S.Ct. 1199 (1967). A constructive trust constitutes a direct claim cognizable in interpleader because it creates a duty to transfer the proceeds to the rightful owner. *Bogert*

Trusts and Trustees (2d ed. Revised 1978) § 476, pp. 119-120.

II. PETITIONERS' RIGHT TO APPEAL WAS DENIED WHEN THE NINTH CIRCUIT REFUSED TO ACKNOWLEDGE PETITIONERS' CLAIMS OF ERROR, REFUSED TO ADDRESS THEIR MERITS OR LACK OF MERITS, FAILED TO OFFER ANALYSIS OR CITE AUTHORITY, AND FAILED TO RULE ON PETITIONERS' ASSERTIONS OF ERROR.

The laws of the United States guarantee Petitioners' right of appeal from the final determination of a district court. See 28 U.S.C. § 1291 and Federal Rules of Civil Procedure rules 3 and 4. At a minimum the right to appeal ought to constitute the right to consideration, reasoning and a ruling from the court to whom an appeal of right is made. Despite repeated pleas by Petitioners that their claims be considered, the Ninth Circuit has steadfastly refused to acknowledge or consider Petitioners' claims of error, even on such fundamental issues as jurisdiction. The Ninth Circuit's treatment of Petitioners' appeal amounts to a denial of Petitioners' right to appeal.

Petitioners have raised dispositive, jurisdictional issues repeatedly at both the trial and appellate court levels. These issues were raised before the Ninth Circuit and thoroughly briefed in Petitioners' Opening Brief, Reply Brief, and two Petitions for Rehearing. No court has addressed a single word to Petitioners' jurisdictional challenges, and no court has issued a determination on their merits.

In their 65-page Opening Brief Petitioners presented arguments that: (1) the probate exception precluded federal jurisdiction of the action; (2) Pimentel must be dismissed from

the interpleader case, as he did not have the requisite adversity to either the fund or the parties; (3) Pimentel failed to meet his burden to prove that the fund was the lawful property of Marcos such that it could satisfy tort claims against him, and the court misapplied the burden of proof to Petitioners; (4) exclusion of the testimony of forensic accountant John Buckley was prejudicial error, in that Buckley was not required to submit an expert report under the rules of civil procedure and inasmuch as no prejudice resulted from his failure to do so as required under the rules; (5) the court applied an erroneous standard and excluded deposition testimony contrary to the hearsay exception for prior testimony; (6) the court made numerous erroneous findings of fact and conclusions of law.

In its original Opinion,[19] the Ninth Circuit included a paragraph describing the background and bases of Petitioners' claims against the assets at the trial court. No mention was made anywhere in the Opinion of Petitioners' assertions of error. The analysis section of the Opinion was dedicated to discussion of issues raised by the Republic of the Philippines, with the exception of a single paragraph at page 1026, which does not discuss any issue raised by Petitioners on appeal and does not cite any authority for the court's seat-of-the-pants declaration of the "fair" result.

Petitioners and others filed petitions for rehearing. In their petition Petitioners asserted that: (1) the court misapplied a rule of civil procedure to decide the merits of the case; (2) authorizing payment of a thief's debts with assets stolen from others is error and fundamentally unfair; (3) the court's novel scheme for distributing an inadequate fund among competing

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[19] App. p. 30a.

claimants lacked analysis and authority; (4) the court failed to consider Petitioners' assertions of error, including jurisdictional errors, prerequisite to distribution of the fund, in violation of Petitioners' right to appeal; (5) the court's holding treated Roxas as if he were a member of a class whose rights had been adjudicated, in violation of his constitutional right to due process; (6) the court's sanction of federal court control of estate assets exceeded federal court jurisdiction.

The holding of the Ninth Circuit's subsequent Opinion[20] did not mention or concern Petitioners. The court did not address any of the jurisdictional issues. It devoted the last two paragraphs of the Opinion to two evidentiary issues raised by the Roxas claimants, but it offered no meaningful analysis or authority and failed to address the any of the authority cited by Petitioners. It offered only the conclusory statement that the expert failed to produce the required report, without explanation and without addressing Petitioners' argument that the expert was not a retained expert and was not, therefore, subject to the report requirement, and without addressing how the failure to produce a report under the circumstances of this case, where the expert was deposed and opposing counsel declined an offer to redepose the expert if he felt his client had been prejudiced by the absence of a report, could result in the prejudice which Federal Rules of Civil Procedure rule 37 requires for exclusion of testimony.

The Opinion stated, without discussion or analysis, that five witness depositions were excludable hearsay because the cross examination in the prior proceeding was not undertaken by a party with a similar motive to develop the testimony,

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[20] App. p. 14a.

without explanation as to why cross-examination taken on behalf of the Marcoses seeking to disprove Roxas' claim that Marcos stole the treasure from him did not have a similar motive as cross-examination taken on behalf of parties in this action seeking, identically, to disprove the claim that Marcos stole the treasure from Roxas. The Opinion was so cursory and incomplete as to deprive Petitioners of a meaningful right to appeal.

Again, Petitioners petitioned the Ninth Circuit for reconsideration, begging the court to consider the issues raise in its appeal and arguing that the Opinion was so incomplete as to deprive Petitioners of their right to appeal. In an Order devoted to the argument of other parties, the Ninth Circuit denied the petition for rehearing and indicated that it would deny any further petitions.[21]

A determination on such significant issues as whether the court had jurisdiction of the case, whether the class members' claim was allowable in interpleader, whether the fund legitimately belonged to Marcos such that it could be subject to the class members' claim, and whether the legitimate owner of stolen assets has a prior right to the assets or their proceeds must logically precede any determination as to distribution of the fund. In spite of three requests that the court consider Petitioners' arguments, even such fundamental arguments as the jurisdiction of the federal court, presented in carefully researched and drafted briefs by experienced and respected attorneys, the Ninth Circuit has utterly refused to do so.

The right to appeal granted to these and other appellants by law, is not a trivial thing. It is important to the perception

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[21] App. p. 1a.

of fairness afforded by the judicial system. It is especially important in this case, where the arguments of a lone individual of humble background have been ignored as unworthy of notice while the court dealt with arguments of a foreign nation, a bank and 9,531 members of a certified class. However, Petitioners' arguments logically precede the arguments of other parties to this action. The court could not reach those arguments without first considering Petitioners' arguments. Petitioners arguments deserve the attention of the appellate court. If their arguments are faulty, the court should show them why. If their arguments have merit, the court is obligated to divest itself of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted and this Court should vacate and reverse the decision in the court below as exceeding the jurisdiction of the federal courts.

Respectfully submitted,

MAGAÑA, CATHCART & MCCARTHY
DANIEL C. CATHCART
LADELL HULET MUHLESTEIN

Attorneys for Petitioners
The Estate of Roger Roxas and
The Golden Budha Corporation

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16401, No. 04-16503, No. 04-16538

[Filed November 3, 2006]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR

CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,
Defendants,

and

ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland,
Defendant-Appellant,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,
Defendant-Appellee,

PHILIPPINE NATIONAL BANK,
Defendant-Appellant.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.)
)
ENC CORPORATION; ARELMA, INC., a corporation)
organized and existing under the laws of Panama with a)
permanent address at Ave. Justo Alosemena y Calle 41)
Este, No. 40-59 Pte al Colegio Immeculada, Panama 1.)
Rep. de Panama, and a mailing address at c/o Suntrust)
Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76,)
1211 Geneva 6, Switzerland; SUNTRUST)
INVESTMENT CO., S.A., a corporation organized)
and existing under the laws of Switzerland with an)
address at rue de Jargonnant 2, P.O. Box 76, 1211)
Geneva 6, Switzerland; JOHN K. BURNS a citizen of)
the United States, with an address at 300 Wacker Drive,)
Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF)
FERDINAND E. MARCOS; IMELDA R. MARCOS;)
FERDINAND R. MARCOS, JR.; MARIA IMELDA)
MARCOS; IRENE MARCOS ARANETA; FRONTIER)
RISK CAPITAL MANAGEMENT, L.C.C., a limited)
liability company organized and existing under the laws)
of the State of Nevada, with a registered office at 6100)
Neil Road, Suite 500, Reno, NV. 89511 and an address)
at 300 Wacker Drive, Suite 900, Chicago, IL 60606;)
GROSVENOR CAPITAL LTD., a company organized)
and existing under the law of the United Kingdom, with)
an address at Grosvenor Gardens House, Suite 117,)
35-37 Grosvenor Gardens, London SW1 W OBS, United)
Kingdom; THE ESTATE OF ROGER ROXAS;)
GOLDEN BUDHA CORPORATION, a corporation)
organized and existing under the laws of the State of)
Georgia, with a registered office at 710 West First Street,)
Blue Ridge, Georgia 30513, and a mailing address at 260)
Carrollton St., Buchanan, GA 30113; PHILIPPINE)
NATIONAL BANK,)
Defendants,)

and)
)
MARIANO J. PIMENTAL, on behalf of himself and all)
other persons similarly situated,)
Defendant-Appellee,)
)
REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL)
COMMISSION ON GOOD GOVERNMENT, a)
government agency of the Republic of the Philippines,)
Defendants-Appellants.)
)

MERRILL LYNCH, PIERCE, FENNER AND SMITH,)
INCORPORATED, a corporation organized and existing)
under the laws of the State of Delaware with its principal)
place of business in New York, New York,)
Plaintiff-Appellee,)
)
v.)
)
ENC CORPORATION; ARELMA, INC., a corporation)
organized and existing under the laws of Panama with a)
permanent address at Ave. Justo Alosemena y Calle 41)
Este, No. 40-59 Pte al Colegio Immeculada, Panama 1.)
Rep. de Panama, and a mailing address at c/o Suntrust)
Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76,)
1211 Geneva 6, Switzerland; SUNTRUST)
INVESTMENT CO., S.A., a corporation organized)
and existing under the laws of Switzerland with an)
address at rue de Jargonnant 2, P.O. Box 76, 1211)
Geneva 6, Switzerland; JOHN K. BURNS, a citizen of)
the United States, with an address at 300 Wacker Drive,)
Suite, 900, Chicago, Illinois, 60606; THE ESTATE)
OF FERDINAND E. MARCOS; IMELDA R.)
MARCOS; FERDINAND R. MARCOS, JR.; MARIA)
IMELDA MARCOS; IRENE MARCOS ARANETA;)

FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; PHILIPPINE NATIONAL BANK; REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,

Defendants,

and

THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants-Appellants,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee.

Before: John T. Noonan, Sidney R. Thomas, Circuit Judges, and James L. Robart,* District Judge.

ORDER

The panel has voted to deny the petitions for rehearing. Judge Thomas has voted to deny the petitions for rehearing en banc and to deny any further petitions and Judge Noonan and Judge Robart so recommend.

Petitioners' fears of *res judicata* are baseless.

The Republic's claims of prejudice under Rule 19(b) are without merit, because its suit to recover the Arelma assets in the Philippines is a forfeiture action, one which a unanimous *en banc* Philippine Supreme Court has "categorically declared" is *in rem. Rep. of the Phil. v. Sandiganbayan*, (2003). The Republic has no jurisdiction over the *rem*, which is in the United States, and any judgment made without proper jurisdiction is unenforceable in the United States. Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(a) (1987).

Petitioner also omits the crucial language in *American Greyhound*, *see* Pet. Reh'g at 6, which reads, "some courts have held that sovereign immunity forecloses in favor of tribes the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune tribes." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002).

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

The full court has been advised of the petitions for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing en banc are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16401, No. 04-16503, No. 04-16538

[Filed September 12, 2006]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the States of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR

CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants,

and

ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland,

Defendant-Appellant,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee,

PHILIPPINE NATIONAL BANK,

Defendant-Appellant.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,

Plaintiff-Appellee,

v.)

ENC CORPORATION; ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260)

Carrollton St., Buchanan, GA 30113; PHILIPPINE NATIONAL BANK,
Defendants,

and

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,
Defendant-Appellee,

REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,
Defendants-Appellants.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive,

Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; PHILIPPINE NATIONAL BANK; REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,

Defendants,

and

THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants-Appellants,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee.

Before: John T. Noonan, Sidney R. Thomas, Circuit Judges, and James L. Robart,* District Judge.

ORDER

The opinion filed May 4, 2006, and amended May 9, 2006, is hereby WITHDRAWN. An amended opinion is filed concurrently with this order.

With the filing of the amended opinion, the panel has voted to deny the petition for rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judge Noonan and Judge Robart so recommend.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED, and the petition for rehearing en banc is DENIED.

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16401, No. 04-16503, No. 04-16538

[Filed September 12, 2006]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the States of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR

CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,
Defendants,

and

ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland,
Defendant-Appellant,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,
Defendant-Appellee,

PHILIPPINE NATIONAL BANK,
Defendant-Appellant.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.)

ENC CORPORATION; ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113; PHILIPPINE

NATIONAL BANK,
Defendants,

and

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,
Defendant-Appellee,

REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,
Defendants-Appellants.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co.S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE

OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; PHILIPPINE NATIONAL BANK; REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,

Defendants,

and

THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants-Appellants,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee.

Before: John T. Noonan, Sidney R. Thomas, Circuit Judges, and James L. Robart,* District Judge.

OPINION

NOONAN, Circuit Judge:

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimentel (Pimentel). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Federal Rule of Civil Procedure 19(b). We affirm the judgment of the district court.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000, by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1972 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. *In re Republic of the Philippines*, 309 F.3d 1143,1149-52 (9th Cir. 2002). The Republic now maintains that it is an indispensable party inasmuch as the Republic asserts that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic. *See* An Act Declaring Forfeiture in Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceeding Therefor, Republic Act No. 1379 (1955) (Forfeiture Act). In the 2002 appeal here, we ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable. We stayed the action. *Republic of the Philippines*, 309 F.3d at 1153.

Pimentel is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 103 F.3d 767 (9th Cir. 1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

Arelma, that is the corporation itself, and the Philippine National Bank, the escrow holder of its stock, have filed a single brief contending that Arelma is an indispensable party and that the district court lacked jurisdiction over Arelma.

The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to

human rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas v. Marcos*, 89 Haw. 91, 969 P.2d 1209 (Haw. 1998). The Hawai'i Supreme Court has allowed Roxas' judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

The case is governed by Federal Rule of Civil Procedure 19. The first section of the rule speaks of "persons needed for just adjudication." The Republic falls within this section because, as the rule puts the matter, the Republic

> claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest.

Fed. R. Civ. P. 19(a). Such a party should be joined to the action.

The rule goes on to prescribe what a court should do "whenever joinder is not feasible." In such a case,

> the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed R. Civ. P. 19(b). Indispensability "can only be determined in the context of particular litigation." *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself, viewed through the lens of "equity and good conscience." *Id.* at 109.

We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties.

Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Only if equity and good conscience require it is a necessary party also indispensable.

In an appeal from the district court's dissolution of the stay, we came close to saying that the Republic was not indispensable. We said:

> the district court . . . held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG. We conclude that [the] district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion.

Merrill Lynch v. Pimentel, Nos. 03-16742, 03-16743, at 3-4 (9th Cir. Feb. 20, 2004) (per curiam). Pimentel argues that implicitly our decision found no parties to be absent but indispensable. We, however, were addressing only the decision to lift the stay. Our decision does not have res judicata effect on the question of indispensability here presented.

Accordingly, we must apply the factors set forth in Rule 19(b), in "the context of [this] particular litigation." *Provident Bank,* 390 U.S. at 118. The phrase "equity and good conscience" in our judicial usage is coterminous with the early opinions of the United States Supreme Court. *See Elmendorf v. Taylor*, 23 U.S. 152, 181, 6 L. Ed. 289 (1825). Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, *see*

Montana v. Crow Tribe of Indians, 523 U.S. 696, 707, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998), the distinction of its two elements has blurred, and it has a secular rather than religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness in the judge's choice of solutions, a choice to be marked by "mercy and practicality." *Hecht v. Bowles*, 321 U.S. 321, 329, 64 S. Ct. 587, 88 L. Ed. 754 (1944).

Prejudice to the Republic

First, we must consider whether a judgment rendered in the absence of the Republic "might be prejudicial to [it] or to those already parties." Fed. R. Civ. P. 19(b). Following the example of the Supreme Court in conducting this analysis, *see Provident Bank* at 115-16, we consider the circumstances and practicalities of the Republic's claim.

The general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990), we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond a three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want of indispensable parties. Similarly, in *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000), a difficult controversy

had been settled by an Accommodation Agreement entered into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under Rule 19, it is not the sole consideration.

The Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account. *See Provident Bank*, 390 U.S. at 115.

To protect a party as indispensable, Rule 19 requires "an 'interest' that will be impaired by the litigation as a practical matter.'" *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002). As a practical matter, it is doubtful that the Republic has any likelihood of recovering the

Arelma assets. The res is in the United States. It cannot be finally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving the assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 19 L. Ed. 2d 936. We do so now.

Scenario one: We dismiss this action. Pimentel sues Merrill Lynch in New York for the assets. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. *See* N.Y. C.P.L.R. § 213. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986; the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Pimentel takes the assets to the extent of his judgment. Scenario two: The plaintiff is the Republic. The Republic is time-barred. Pimentel intervenes and obtains the assets.

The Republic insists that it could obtain a judgment regarding the ownership of these assets in the Philippines, where it is relieved of any statute of limitations. But a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States. If a Philippine court were to issue such a decree, a court of this country would not be bound to give it effect. *See Tchacosh Co. v. Rockwell Int'l*, 766 F.2d 1333, 1336 (9th Cir. 1985); *see also* Restatement (Third) of Foreign Relations § 482(2)(a) (1987).

Finally, we note that any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans v. Oregon*, 444 U.S. 380,

386, 100 S. Ct. 616, 62 L. Ed. 2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed, the Republic might seek the equivalent of the assets from their present holder, Merrill Lynch, in New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford v. International Harvester Co.*, 668 F.2d 142, 147 (2d Cir. 1981); N.Y. C.P.L.R. § 213 (misappropriation of public property). Tolling by Marcos' time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

The Possibility of Protective Provisions

Rule 19 (b) requires us to assess the opportunity for the court to use "protective provisions in the judgment" by which "the prejudice" to the absent party "can be lessened or avoided." Fed. R. Civ. P. 19(b). Because the Republic has little practical likelihood of obtaining the Arelma asserts, there is no need to lessen prejudice to it.

Adequacy of Judgment and Availability of Alternative Forums

Under Rule 19(b), we are charged with determining whether "a judgment rendered in [the Republic's] absence will be adequate" and "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Fed. R.Civ. P. 19(b). We note the presence in this action of victims of the former president of the Republic. The class represented by Pimentel has secured a judgment against Marcos of almost $2

billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them.

The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. If we dismiss the action for nonjoinder of the Republic, they will have no forum within the Philippines open to their claims. They might sue again within the United States, perhaps in New York, yet such a suit would merely raise the same question of indispensability.

Balancing of the Factors

In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimentel and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

The Claims of Arelma and the Philippine National Bank

As the district court has determined, Arelma is a shell corporation, and the court may look through the corporate form to Marcos, the owner of its assets. *Chung v. Animal*

Clinic, Inc., 63 Haw. 642, 636 P.2d 721, 723 (Haw. 1981). Accordingly, neither Arelma itself nor the Philippine National Bank as escrow holder now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

The Claims of Roxas and Golden Budha

Roxas was a victim, too. His injury was suffered before the date used to determine the Pimentel class. The district court, however, found that Roxas had not proven that the assets in the Arelma account derived from any treasure stolen from him. Roxas contends that the district court erred in excluding expert testimony regarding the source of the funds and in excluding depositions of fact witnesses from his earlier action against Marcos. We do not believe that the district court abused its discretion in either ruling. The expert failed to produce the report required by Fed. R. Civ. P. 26(a)(2), and the district court acted within its discretion in excluding his testimony. *See Yeti by Molly, Ltd. v. Deckers Outdoor Co.*, 259 F.3d 1101, 1105-06 (9th Cir. 2001). As for the depositions, they were excludable as hearsay because the cross examination in the prior proceeding was not undertaken by a party with a "similar motive to develop the testimony." Fed. R. Evid. 804(b)(1). We agree with the district court that the record does not support a finding that the Arelma assets were stolen from Roxas.

As the district court held, Roxas' tort judgment is against Imelda Marcos personally. It does not bind the Marcos estate. Roxas has no claim to be satisfied here.

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16401, No. 04-16503, No. 04-16538

[Filed May 4, 2006]

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.

ENC CORPORATION; SUNTRUST INVESTMENT CO., S.A., a corporation organized and existing under the laws of Switzerland with an address at rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland; JOHN K. BURNS, a citizen of the United States, with an address at 300 Wacker Drive, Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF FERDINAND E. MARCOS; IMELDA R. MARCOS; FERDINAND R. MARCOS, JR.; MARIA IMELDA MARCOS; IRENE MARCOS ARANETA; FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR

CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1s W OBS, United Kingdom; THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,
Defendants,

and

ARELMA, INC., a corporation organized and existing under the laws of Panama with a permanent address at Ave. Justo Alosemena y Calle 41 Este, No. 40-59 Pte al Colegio Immeculada, Panama 1. Rep. de Panama, and a mailing address at c/o Suntrust Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76, 1211 Geneva 6, Switzerland,
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MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated;,
Defendant-Appellee,

PHILIPPINE NATIONAL BANK,
Defendant-Appellant.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in New York, New York,
Plaintiff-Appellee,

v.)
)
ENC CORPORATION; ARELMA, INC., a corporation)
organized and existing under the laws of Panama with a)
permanent address at Ave. Justo Alosemena y Calle 41)
Este, No. 40-59 Pte al Colegio Immeculada, Panama 1.)
Rep. de Panama, and a mailing address at c/o Suntrust)
Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76,)
1211 Geneva 6, Switzerland; SUNTRUST)
INVESTMENT CO., S.A., a corporation organized)
and existing under the laws of Switzerland with an)
address at rue de Jargonnant 2, P.O. Box 76, 1211)
Geneva 6, Switzerland; JOHN K. BURNS, a citizen of)
the United States, with an address at 300 Wacker Drive,)
Suite, 900, Chicago, Illinois, 60606; THE ESTATE OF)
FERDINAND E. MARCOS; IMELDA R. MARCOS;)
FERDINAND R. MARCOS, JR.; MARIA IMELDA)
MARCOS; IRENE MARCOS ARANETA; FRONTIER)
RISK CAPITAL MANAGEMENT, L.C.C., a limited)
liability company organized and existing under the laws)
of the State of Nevada, with a registered office at 6100)
Neil Road, Suite 500, Reno, NV. 89511 and an address)
at 300 Wacker Drive, Suite 900, Chicago, IL 60606;)
GROSVENOR CAPITAL LTD., a company organized)
and existing under the law of the United Kingdom, with)
an address at Grosvenor Gardens House, Suite 117,)
35-37 Grosvenor Gardens, London SW1 W OBS, United)
Kingdom; THE ESTATE OF ROGER ROXAS;)
GOLDEN BUDHA CORPORATION, a corporation)
organized and existing under the laws of the State of)
Georgia, with a registered office at 710 West First Street,)
Blue Ridge, Georgia 30513, and a mailing address at 260)
Carrollton St., Buchanan, GA 30113; PHILIPPINE)
NATIONAL BANK,)
Defendants,)

and)
)
MARIANO J. PIMENTAL, on behalf of himself and all)
other persons similarly situated,)
Defendant-Appellee,)
)
REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL)
COMMISSION ON GOOD GOVERNMENT, a)
government agency of the Republic of the Philippines,)
Defendants-Appellants.)
)

MERRILL LYNCH, PIERCE, FENNER AND SMITH,)
INCORPORATED, a corporation organized and existing)
under the laws of the State of Delaware with its principal)
place of business in New York, New York,)
Plaintiff-Appellee,)
)
v.)
)
ENC CORPORATION; ARELMA, INC., a corporation)
organized and existing under the laws of Panama with a)
permanent address at Ave. Justo Alosemena y Calle 41)
Este, No. 40-59 Pte al Colegio Immeculada, Panama 1.)
Rep. de Panama, and a mailing address at c/o Suntrust)
Investment Co. S.A., rue de Jargonnant 2, P.O. Box 76,)
1211 Geneva 6, Switzerland; SUNTRUST)
INVESTMENT CO., S.A., a corporation organized)
and existing under the laws of Switzerland with an)
address at rue de Jargonnant 2, P.O. Box 76, 1211)
Geneva 6, Switzerland; JOHN K. BURNS, a citizen of)
the United States, with an address at 300 Wacker Drive,)
Suite, 900, Chicago, Illinois, 60606; THE ESTATE)
OF FERDINAND E. MARCOS; IMELDA R.)
MARCOS; FERDINAND R. MARCOS, JR.; MARIA)
IMELDA MARCOS; IRENE MARCOS ARANETA;)

FRONTIER RISK CAPITAL MANAGEMENT, L.C.C., a limited liability company organized and existing under the laws of the State of Nevada, with a registered office at 6100 Neil Road, Suite 500, Reno, NV. 89511 and an address at 300 Wacker Drive, Suite 900, Chicago, IL 60606; GROSVENOR CAPITAL LTD., a company organized and existing under the law of the United Kingdom, with an address at Grosvenor Gardens House, Suite 117, 35-37 Grosvenor Gardens, London SW1 W OBS, United Kingdom; PHILIPPINE NATIONAL BANK; REPUBLIC OF THE PHILIPPINES; PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, a government agency of the Republic of the Philippines,

Defendants,

and

THE ESTATE OF ROGER ROXAS; GOLDEN BUDHA CORPORATION, a corporation organized and existing under the laws of the State of Georgia, with a registered office at 710 West First Street, Blue Ridge, Georgia 30513, and a mailing address at 260 Carrollton St., Buchanan, GA 30113,

Defendants-Appellants,

MARIANO J. PIMENTAL, on behalf of himself and all other persons similarly situated,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawaii
Manuel L. Real, District Judge, Presiding

Before: John T. Noonan, Sidyney R. Thomas, Circuit Judges, and James L. Robart,* District Judge.

SUMMARY

Civil Litigation and Procedure/Parties - Interpleader

The court of appeals affirmed a judgment of the district court. The court held that the Republic of the Philippines was not an indispensable party under Federal Rule of Civil Procedure 19(b) in an interpleader action concerning the assets of a bank account established by a former president of the Republic.

Appellee Merrill, Lynch, Pierce, Fenner and Smith, Inc., the custodian of the assets of appellant Arelma, S.A. (Arelma), began an interpleader action in district court in Hawaii in 2000. The Merrill Lynch account was found by the district court to have been established in 1992 by a deposit of $2 million by Ferdinand E. Marcos, then the president of appellant the Republic of the Philippines. The shares of Arelma, a Panamanian "shell" corporation, were held in escrow by appellant the Philippine National Bank, pending an ownership determination by the Philippine courts. The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. On appeal in 2002, the court of appeals ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable; the court of appeals stayed the action. The district court dissolved the stay and awarded all the Arelma assets to a class of human rights victims–represented by

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

appellee Mariano Pimental–who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion.

The Republic appealed, maintaining that it was an indispensable party inasmuch as the Republic asserted that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic.

[1] The first section of Rule 19 speaks of persons needed for just adjudication. The Republic fell within this section because the Republic claimed an interest relating to the subject of the action and was so situated that the disposition of the action in its absence might as a practical matter impair or impede its ability to protect that interest. Whenever joinder is not feasible, a court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. [2] The court of appeals' determination in 2002 that the Republic was a necessary party appeared to mean that for a just disposition of the assets it was necessary that the Republic participate. Only if equity and good conscience require it is a necessary party also indispensable.

[3] First, the general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. When the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under the guidance of equity and good conscience, it is not the sole consideration. [4] Second, the Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since 1988. As

an equitable consideration, the Republic's failure to secure a judgment affecting the assets was a factor to be taken into account. [5] Third, the presence in this action of victims of the former president of the Republic had to be noted. The symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it would have monetary meaning for the poor among them. [6] A final consideration: the res was in the United States. It could not be finally disposed of except by the judgment of a court in the United States. [7] In terms of the factors set out by Rule 19(b) as included among those "to be considered," the Republic would not be prejudiced because it had no practical likelihood of obtaining the Arelma assets and so there was no need of lessening prejudice to it; judgment rendered in its absence would be adequate. [8] Neither Arelma itself nor the Philippine National Bank had an interest to be protected. Merrill Lynch risked being sued again, but it indicated no dissatisfaction with the judgment. The judgment of the district court had to be affirmed.

COUNSEL

Stephen V. Bomse, San Francisco, California, for Republic of the Philippines.

Jay R. Ziegler, Los Angeles, California, for Arelma, Inc. and Philippine National Bank.

Daniel C. Cathcart, Los Angeles, California, for defendants-appellants Golden Budha Corp. and Estate of Roxas.

Robert A. Swift, Philadelphia, Pennsylvania, for defendant-appellee Mariano J. Pimental.

OPINION

NOONAN, Circuit Judge:

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimental (Pimental). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Fed. R. Civ. P. 19(b). We affirm the judgment of the district court as modified below.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000 by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1992 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. *In re Republic of the Philippines*, 309 F.3d 1143, 1149-52 (9th Cir. 2002). The Republic now maintains that it is an indispensable party inasmuch as the Republic asserts that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic. *See* An Act Declaring Forfeiture in

Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceeding Therefor, Republic Act No. 1379 (1955) (Forfeiture Act). In the 2002 appeal here, we ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable. We stayed the action. *Republic of the Philippines*, 309 F.3d at 1153.

Pimental is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 103 F.3d 767 (9th Cir. 1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

Arelma, that is the corporation itself, and the Philippine National Bank, the escrow holder of its stock, have filed a single brief contending that Arelma is an indispensable party and that the district court lacked jurisdiction over Arelma.

The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to human rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas v. Marcos*, 89 Haw. 91, 969 P.2d 1209 (Haw. 1998). The Hawai'i Supreme Court has allowed Roxas'

judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

[1] The case is governed by Fed. R. Civ. P. 19. The first section of the rule speaks of "persons needed for just adjudication." The Republic falls within this section because, as the rule puts the matter, the Republic "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest." Such a party should be joined to the action. Rule 19(a). The rule goes on to prescribe what a court should do "whenever joinder is not feasible." In such a case, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a

judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder." Rule 19(b).

[2] We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties. Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Indispensability "can only be determined in the context of particular litigation." *Provident Bank v. Patterson*, 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself: equity and good conscience. *Id.* at 109. Only if equity and good conscience require it is a necessary party also indispensable.

In an appeal from the district court's dissolution of the stay, we came close to saying that the Republic was not indispensable. We said: "the district court . . . held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG. We conclude that [the] district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion." *Merrill Lynch v. Pimental*, Nos. 03-16742, 03-16743, at 3-4 (9th Cir. Feb. 20, 2004) (per curiam). Pimental argues that implicitly our decision found no parties to be absent but indispensable. We, however, were addressing only the decision to lift the stay. Our decision does not have res judicata effect on the question of indispensability here presented.

The phrase "equity and good conscience" in our judicial usage is coterminous with the first opinions of the United States Supreme Court. *See Hollingsworth v.* Ogle, 1 U.S. 257 (1788). Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, *see, Montana v. Crow Tribe of Indians*, 523 U.S. 696, 707, 118 S. Ct. 1650, 140 L. Ed. 2d 898 (1998), the distinction of its two elements has blurred, and it has a secular rather than religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness and the moral weighing that should attend the judge's choice of solutions, a choice to be marked by "mercy and practicality." *Hecht v. Bowles*, 321 U.S. 321, 329, 64 S. Ct. 587, 88 L. Ed. 754 (1944).

[3] What do equity and good conscience now require here? First, the general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990) we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond the three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want of indispensable parties. Similarly, in *Manybeads v. United*

States, 209 F.3d 1164 (9th Cir. 2000) a difficult controversy had been settled by an Accommodation Agreement entered into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under the guidance of equity and good conscience, it is not the sole consideration.

[4] Second, the Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account.

Any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 386, 100 S. Ct. 616, 62

L. Ed. 2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed, the Republic might seek the equivalent of the assets from their holder, Merrill Lynch, in New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford v. International Harvester Co.*, 668 F.2d 142, 147 (2d Cir. 1981); NY CPLR § 213 (misappropriation of public property). Tolling by Marcos' time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

[5] Third, we note the presence in this action of victims of the former president of the Republic. The class represented by Pimental has secured a judgment against Marcos of almost $2 billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them. The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?

Roxas was a victim, too. His injury was suffered before the date used to determine the class. He, too, has a judgment against Marcos, which resulted in an award of damages that has been affirmed on appeal. *Roxas v. Marcos*, 109 Hawai'i 83, 123 P.3d 208 (2005) (unpublished). Should he, an early victim of Marcos, recover more in this action than the victims comprising the class? Roxas's claim that the assets could be traced to the Merrill Lynch account was not accepted by the district court. But if it were accepted, we believe that equity could assign him no more than the pro rata share due any class member; it is fair to treat him as entitled to this much and no more.

[6] A final consideration: the res is in the United States. It cannot be finally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 19 L. Ed. 2d 936. We do so now:

Scenario one: We dismiss this action. Roxas sues Merrill Lynch in New York for the assets asserting conversion. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986; the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Roxas takes the assets to the extent of his judgment. Scenario two: The same, except the successful plaintiff in New York is Pimental. Scenario three: The plaintiff is the Republic. The Republic is time-barred. Pimental and Roxas intervene and obtain their proportionate share of the assets.

Realistically, we cannot envisage a lawsuit in which the Republic will prevail.

[7] In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimental and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

[8] As the district court has determined, Arelma is a shell corporation, and the court may look through the corporate form to Marcos, the owner of its assets. *Chung v. Animal Clinic, Inc.*, 63 Haw. 642, 636 P.2d 721, 723 (Haw. 1981). Accordingly, neither Arelma itself nor the Philippine National Bank now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

Accordingly, we AFFIRM the judgment of the district court, modified to allot to Roxas a share of the assets no greater than that of any class member.

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF HAWAI`I

NO. 24605

[Filed November 29, 20

ESTATE OF ROGER ROXAS,	)
	)
and	)
	)
GOLDEN BUDHA CORPORATION,	)
Plaintiffs-Appellants/Cross-Appellees,	)
	)
vs.	)
	)
IMELDA MARCOS,	)
Defendant-Appellee/Cross-Appellant,	)
	)
and	)
	)
FERDINAND MARCOS,	)
Defendant.	)
	)

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST CIRCUIT
(Civ. No. 88-0522)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ., and Circuit Judge Alm, in place of Acoba, J., recused.)

The plaintiffs-appellants/cross-appellees the Estate of Roger Roxas and the Golden Budha Corporation (GBC) [collectively, hereinafter, "the Appellants"] appeal from, and the defendant-appellee/cross-appellant Imelda Marcos [hereinafter, "Imelda"] cross-appeals from, the fourth amended judgment, filed on September 6, 2001, of the circuit court of the first circuit, the Honorable Marie N. Milks presiding.

On appeal, the Appellants contend that the circuit court erred in: (1) its determination of the "reasonable period of time" during which the highest daily price of gold would fix the proper amount of damages [hereinafter, "reasonable period"]; and (2) denying the Appellants' motion to grant relief pursuant to Hawai`i Rules of Civil Procedure (HRCP) Rule 60(b) by including as defendants Imelda and Ferdinand Marcos II, as personal representatives of the Estate of Ferdinand Marcos.

Imelda alleges in her cross-appeal that the circuit court erred in: (1) "conclud[ing] that a reasonable investor with adequate funds would have waited until nearly four years after the . . . conversion to replace the converted gold"; and (2) "finding . . . that '[f]rom April 5, 1971 until November 19, 1974, there was no continuous period of 30 days that Roxas was not in fear for his safety, in custody, or in hiding.'"

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the September 6, 2001 fourth amended judgment of the circuit court for the following reasons:

(1) When calculating the reasonable period, the fact-finder should consider the hypothetical behavior of a "reasonable investor" in the context of the surrounding fact constellation. *See Taylor v. Smith, Barney & Co.*, 358 F. Supp. 892, 895 & n.8 (D. Utah 1973).

(2) Inasmuch as the record contains substantial evidence that between May 18, 1971 and November 19, 1974 (thirty days before the end of the circuit court's reasonable period), Roxas was arrested, detained, threatened, and tortured, *see Roxas v. Marcos*, 89 Hawai`i 91, 103-04, 969 P.2d 1209, 1221-22 (1998) [hereinafter, "*Roxas I*"], the circuit court did not clearly err in finding that Roxas was "in fear for his safety, in custody, or in hiding" -- and consequently unable to cover his loss -- for more than thirty days after the raid.

(3) Notwithstanding the much shorter reasonable periods that other courts have applied to conversions of securities, the present matter involved a treasure that was so unique in value and appearance that such prior case law is inapplicable. Consequently, the circuit court did not clearly err in determining the endpoint of the reasonable period.

(4) Inasmuch as Roxas's inability to file suit for fifteen years is attributable, at least in part, to Ferdinand Marcos's constitutional immunity, *see Roxas I*, 89 Hawai`i at 129, 969 P.2d at 1247, and does not necessarily imply Roxas's inability to enter the gold market for fifteen years, the circuit court did not clearly err in establishing a reasonable period ending before 1986.

(5) Notwithstanding the Appellants' argument that certain witnesses' "opinions and probable estimates pertaining to the quantity, quality, and/or purity of the gold" would have produced a fairer measure of damages than the New York

rule, the Appellants do not indicate where in the record such testimony can be found. Therefore, they have waived this point of error by failing to provide citations to the record pursuant to Hawai`i Rules of Appellate Procedure Rule 28(b)(7).

(6) Insofar as this court: (a) held in *Roxas I* that judgment could not properly lie against Ferdinand's Estate, nor against Ferdinand himself, 89 Hawai`i at 123, 969 P.2d at 1241; and (b) instructed the circuit court to "hold Imelda personally liable, at least to the extent of her interest in the assets of the . . . Estate [of Ferdinand], for the amount of the . . . judgment against Ferdinand," the circuit court's fourth amended judgment followed this court's mandate precisely. No relief pursuant to Hawai`i Rules of Civil Procedure Rule 60(b) was warranted. Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai`i, November 29, 2005.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CASE NO. CV00-595-R

[Filed July 12, 2004]

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, Plaintiff,	)
vs.	)
ARELMA, INC., et al., Defendants.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before this Court, sitting without a jury, February 23, 2004, and the Court, having heard and considered the evidence, both oral and documentary, any stipulations of the parties, and the argument of counsel, finds the facts and states the conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure as follows:

FINDINGS OF FACT

1. Plaintiff Merrill Lynch, Pierce, Fenner & Smith Incorporated (Merrill Lynch) is a corporation organized under the laws of the State of Delaware with its principal place of business in New York, New York.

2. Claimant Arelma S.A., named herein as Arelma, Inc. (Arelma) is a corporation organized under the laws of Panama in 1972 by Ferdinand E. Marcos, and at all times has been and is now a corporation in good standing under Panamanian law. No stock was issued in Arelma S.A. upon its formation. Ferdinand E. Marcos was the sole owner of Arelma S.A..

3. Claimant Philippine National Bank (PNB) is a commercial banking corporation organized under the laws of the Republic of the Philippines with its principal place of business in Metro Manila, Philippines and with a Hawaii-licensed foreign bank agency maintaining an office in Honolulu, Hawaii.

4. Claimant Mariano J, Pimentel (Pimentel) is a citizen of the Republic of the Philippines, residing in Honolulu, Hawaii, and is a member of the plaintiff class that obtained a judgment in the total sum of nearly two billion dollars on February 3, 1995 against the Estate of Ferdinand E. Marcos (Marcos Estate) in the legal action entitled "In Re Estate of Ferdinand E. Marcos, Human Rights Litigation," MDL No. 840 (the Human Rights Victims' Judgment). On May 26, 1995 in the same legal action a contempt order was entered against Imelda R. Marcos and Ferdinand R. Marcos, Jr., which included a fine in the amount of $100,000 per day.

5. Defendant Estate of Roger Roxas (Roxas), whose personal representative is Felix Dacanay, a resident of Florida, and defendant Golden Budha Corporation (Golden Budha), a corporation organized under the laws of the State of

Georgia, (collectively Roxas/Golden Budha) obtained a judgment, entered *nunc pro tunc* as of October 21, 1996, against Imelda Marcos, in her personal capacity to the extent of her interest in the Marcos Estate, in the sum of $19,275,848.37, plus taxable costs of $61,074.54 (the Roxas/Golden Budha Judgment).

6. All other named claimants have defaulted, have disclaimed any interest in the subject matter of this interpleader or have been dismissed by the Court, other than defendants ENC Corporation, John K. Burns and Frontier Risk Capital Management, LLC, each of whom filed Answers to the Complaint on file herein, but did not appear at trial. There is no evidence in support of any claim of those three defendants to the interpleaded assets.

7. Ferdinand E. Marcos served as president of the Philippines from 1965 until February 1986. (Jt. Pretrial Stip.) He was the de jure government of the Republic of the Philippines during his term in office.

8. Ferdinand E. Marcos departed the Philippines in February 1986 and died in Hawaii on September 29, 1989. (Jt. Pretrial Stip.)

9. In 1972 Jean Louis Sunier, a Swiss banker, recommended to Ferdinand E. Marcos, through Marcos' friend Jose Campos, that Marcos set up a securities trading account in the United States. (Ex. 2)

10. The creation of Arelma in September 1972 coincided with Ferdinand E. Marcos' declaration of martial law in the Philippines. (Ex. 40)

11. During martial law, Marcos increased his individual power so that he could personally govern and direct the operation of the entire government. (Ex. 33 and 40) By his Order, tens of thousands of persons were arrested and detained without charges and without the right of habeas corpus. (Ex. 34 and 40) Thousands were subjected to hideous tortures. Thousands more were summarily executed and others simply "disappeared." (Ex. 35 and 40)

12. The Swiss banker recommended that the account be in the name of a Panamanian corporation called Arelma, Inc. which he caused to be formed in Panama in September 1972. (Ex. 2)

13. A securities account No. 165-07312, was established at Merrill Lynch in New York by Arelma in 1972. (Jt. Pretrial Stip.) On the account opening form, Merrill Lynch listed the Arelma entity as a "holding company." (Ex. 6)

14. The account of Merrill Lynch was funded by Arelma with a deposit of $2,000,000 in 1972. (Jt. Pretrial Stip.; Ex. 8 and 9; Sunier Dep. 60) The source of those funds was Ferdinand E. Marcos.

15. The property which is the subject of this interpleader, is the assets which were held in a securities account No. 165-07312 at Merrill Lynch in the name of Arelma. (Jt. Pretrial Stip.)

16. Merrill Lynch deposited the entire assets in account No. 165-07312, approximately $35 million, with the Clerk of the Court in Federal Court in Hawaii after Merrill Lynch filed this action in interpleader. (Jt. Pretrial Stip.; Ex. 32) Merrill Lynch makes no claim to ownership of Arelma assets.

17. The only share certificates in Arelma were issued in 1981 (9 years after its formation) when two bearer share certificates for 50 shares each were issued "in blank," meaning no name was inserted on the share certificates. Jean Louis Sunier, an officer of Swiss Bank corporation until 1983 and an officer and director of Suntrust Investment Co. thereafter, maintained possession and custody of the share certificates in trust for Ferdinand E. Marcos from 1981 until he surrendered them to the Swiss government as directed by that government in 2000. (Jt. Pretrial Stip.; Sunier Dep. 67) No Swiss court determined the ownership of the share certificates.

18. Arelma had the same officers, Messrs Sunier and Barbey who were Swiss Bank Corporation employees, until 1981 when the Bank required its employees to resign as officers of corporations whose financial affairs it managed. In 1983 Mr. Sunier arranged for three of his personal lawyers to be elected the new officers in a meeting held in his office at the Bank. Until 2000 these officers never changed and the officers never took any actions on behalf of Arelma. (Sunier Dep. 69; Ex. 19 and 29)

19. In early communications to the owner, Sunier used the euphemism of "friend" or "friends" when referring to Marcos. (Ex. 2, 13 and 14) In a letter dated May 19, 1983, to the account holder addressed "Dear Excellency" and containing the code word "Sapphire", Mr. Sunier gave the current account balance. (Sunier Dep. 86) Sunier also explained his change of Arelma officers but assured the account holder that "I keep on controlling all operations for the companies." The reference to "Excellency" is to Fedinand E. Marcos. (Ex. 19)

20. From its inception, Arelma had articles of incorporation (or corporate constitution) but no corporate by-laws. The articles of incorporation required the shareholders to hold an annual meeting and to elect directors annually. (Ex. 46)

21. Arelma never held an annual shareholder meeting; and only held director meetings on two occasions over 28 years to change officers and directors and to issue the two stock certificates. (Sunier Dep. 87 and 89; Ex. 29)

22. Other than the two meetings of board members, Arelma has no minutes of director meetings prior to 2000. (Sunier Dep. 89)

23. Arelma never had any employees. (Sunier Dep. 90)

24. Arelma never had an accountant and never paid any income or corporate taxes. (Sunier Dep. 90)

25. Arelma never had standard financial statements, such as a balance sheet or profit and loss statement. (Sunier Dep. 90)

26. Arelma never had any assets except for the Merrill Lynch account and a small account at Swiss Bank Corporation. (Sunier Dep. 92)

27. Arelma never maintained an office or place of business, and used a Swiss address (Swiss Bank Corporation and later Suntrust) as an address for mail. (Ex. 10, 21)

28. Arelma never paid taxes to any taxing authority other than Panama, and that related solely to the fee for Arelma's continued incorporation. After 1983 these were paid by

Suntrust for which it was reimbursed by transfers from Arelma's account at Merrill Lynch. (Ex. 25, 26, 30)

29. In 1987 a New York Federal court in the case of *Republic of the Philippines v. Ferdinand E. Marcos* froze the Arelma account at Merrill Lynch. (Ex. 23; Sunier Dep. 81) No claim of sovereign immunity was made in that case freezing the Arelma account.

30. The Swiss Federal Supreme Court has twice held that Ferdinand E. Marcos controlled Arelma and that Marcos had the power of disposition over Arelma. Arelma was a party in both proceedings and represented by legal counsel. (Ex. 47 at A14 and Ex.48 at C17)

31. 1997 Imelda Marcos engaged John Burns, a banker, to try and recover the assets in the Merrill Lynch account on behalf of the Estate of Ferdinand E. Marcos. Imelda Marcos and Ferdinand R. Marcos, as executors of his Estate, executed powers of attorney to Burns for this purpose, and he made a demand on Merrill Lynch to release the assets. (Burns Dep. 21-23; Ex. 28 and 29)

32. Sunier's power of attorney expressly included the duty to appear and act on behalf of Arelma in legal proceedings. (Ex. 46) In 1997 Sunier acknowledged in a signed statement to Swiss authorities that the formation of Arelma in September 1972 was part of a new relationship with Ferdinand Marcos. He acknowledged that he held the Arelma share certificates and was the only person in contact with the Marcos family. (Ex. 29)

33. Suntrust and Sunier have admitted that Arelma was incorporated to receive funds owned by Ferdinand Marcos, and that Marcos controlled Arelma during his lifetime. (Ex.

44; Sunier Dep. 46-47) Upon Marcos death that control passed to his Estate.

34. The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead. (Pimentel Dep. 84-85 and 93-94)

35. The class of Filipino Judgment Creditors in MDL No. 840 has a Final Judgment entered February 3, 1995 against the Estate of Ferdinand E. Marcos in the principal amount of $1,964,005,859.90 plus interest at the rate allowed by 28 U.S.C. § 1961 which has not been satisfied. (Jt. Pretrial Stip.)

36. The class of Filipino Judgment Creditors in MDL No. 840 has a contempt award against Imelda R. Marcos and Ferdinand R. Marcos, personally, in the amount of $100,000 per day which had been running since June 30, 1995, and which has not been satisfied. (Jt. Pretrial Stip.)

37. Neither Golden Budha Corporation nor Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against the Estate of Ferdinand E. Marcos. (Jt. Pretrial Stip.)

38. Golden Budha Corporation has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of $13,275,848.37 as of October 21, 1996. (Jt.

Pretrial Stip.) This claim, if any, is junior to the claim of the class of Filipino Judgment Creditors in MDL No. 840.

39. Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of $6 million as of October 21, 1996. (Jt. Pretrial Stip.) This claim, if any, is junior to the claim of the Filipino Judgment Creditors in MDL No. 840.

40. PNB, as an escrow agent, holds the two bearer share certificates owned by the Estate of Ferdinand E. Marcos, issued by Arelma pursuant to an Escrow Agreement dated August 14, 1995 between PNB and the PCGG. (Jt. Pretrial Stip.)

41. The two Arelma bearer share certificates owned by the Estate of Ferdinand E. Marcos were delivered to PNB by the PCGG which obtained them from the Swiss government. (Jt. Pretrial Stip.)

42. Suntrust Investment Co. has disclaimed any interest in the interpleaded assets. (Jt. Pretrial Stip.)

43. Pursuant to the Swiss Closing Order, the Arelma bearer share certificates were subsequently returned to the Philippines and since on or about July 28, 2000, have been in the possession of and held by PNB, as escrow holder, according to the Arelma Escrow Agreement.

44. On or about November 20, 2000, the Board of Directors of Arelma held a special meeting at which the Board of Directors granted a general power of attorney in favor of PNB to represent Arelma in seeking the transfer of the assets

in the Arelma Account to PNB as escrow holder. (Trial Exhibits 125 and 136) There is no evidence that the Board of Directors was duly elected and acting for Arelma S.A. owned by Ferdinand Marcos.

CONCLUSIONS OF LAW

1. Pursuant to 28 U.S.C. §2361 interpleader is a hybrid civil action in which there is no defendant upon whom liability can be claimed. There are only claimants invited, not summoned, to make a claim against the interpleaded fund.

2. This Court has jurisdiction pursuant to 28 U.S.C. §1335 since two or more of the claimants are of diverse citizenship and the amount at issue has been deposited with the Clerk of the Court. Jurisdiction also exists pursuant to 28 U.S.C. §1655 and the doctrines of *quasi in rein and in rem* jurisdiction. Jurisdiction was perfected when the plaintiff deposited the assets at issue with the Clerk of the Court.

3. Venue is based upon 28 U.S.C. §1397 since two of the claimants, Pimentel and PNB reside in Hawaii.

4. Arelma was properly served pursuant to FRCP Rule 4(k)(1)(C) which provides for nationwide service of process: "Service of summons is effective to establish jurisdiction over the person of a defendant [claimant] ... who is subject to the Federal interpleader jurisdiction under 28 U.S.C. §1335..." *See Rubinbaum v. Related Corporate Partners V,* 154 F.Supp.2d 481,486 (SDNY 2001).

5. Minimum jurisdiction contacts are satisfied for purposes of personal jurisdiction over Arelma, Inc. since it had a muli-million dollar trading account at Merrill Lynch in New York

between 1972 and 2000. *See SIPC v. Vigman,* 764 F.2d 1309, 1315-16 (9th Cir. 1985).

6. Because this Court has Federal subject matter jurisdiction based on the Federal Interpleader Statute, 28 U.S.C. §1335, and *in rem* jurisdiction under 28 U.S.C. §1655, federal substantive law applies, although a Federal court may look to state law for guidance. *Board of Trustees v. Valley Cabinet & Mfg. Co.,* 877 F.2d 769, 772 (9th Cir. 1989). In this case, New York has the most significant contacts to the interpleaded assets.

7. It would be contrary to the public policy of the United States to apply the law of Panama when, based on Arelma's contention, Panamanian law precludes use of the *alter ego* doctrine among private parties. See *First National City Bank v. Banco Para el Comercio Exterior,* 462 U.S. 611, 621 (1983) ("As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue. To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result." [citations and footnotes omitted]); *Itel Containers International Corp. v. Atlanttrafik Express Service Ltd.,* 1988 U.S.Dist. LEXIS 7051 at 12 (S.D.N.Y. 1988); *Marlowe v. Argentine Naval Commission,* 604 F.Supp 703, 705 (D.D.C. 1985); *Edwards v. Schillinger,* 245 Ill. 231, 91

N.E. 1048, 1053 (1910) (term "internal affairs" does not extend to cheating creditors, but must be confined to relations affecting only stockholders and corporation among themselves).

8. Under federal common law, a corporation's veil may be pierced based upon three factors:

a) the amount of respect given to the separate identity of the corporation by its shareholders;
b) the degree of injustice visited upon the litigants by recognition of the corporate entity; and
(c) the fraudulent intent of the incorporators.

Board of Trustees v. Valley Cabinet & Mfg. Co., supra. For a party to prevail, he must satisfy the first prong and either the second or third prong. *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1475 (92 Cir.), *cert. denied*, 133 L.Ed.2d 203 (1995). Piercing of the corporate veil is an equitable remedy addressed to the discretion of the court. *McClaran v. Plastic Industries, Inc.*, 97 F.3d 347 (9th Cir. 1996). The law of New York is similar to Federal law on this subject. See *Goya Foods, Inc. v. Unanue,* 233 F.3d 38, 43 (1st Cir. 2000) (applying New York law). New York law, like Federal law, permits "reverse piercing" of the corporate veil. *Id.*

9. PNB, as escrow agent for the parties claiming ownership of the Arelma share certificates, lacks standing to seek ownership of the proceeds of the Merrill Lynch account which was maintained in the name of Arelma, Inc. See *Dole Food Co. v. Patrickson,* 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003) (A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. An individual shareholder, by virtue of ownership of shares, does

not own the corporation's assets..."). Moreover, Arelma itself is a party actively seeking control of the assets at issue.

10. Arelma and PNB are collaterally estopped from denying or opposing the findings of the Swiss Federal Supreme Court that Ferdinand Marcos controlled Arelma. (Lebrecht Dep. 27-31)

11. The Marcoses had a highly developed and sophisticated pattern and practice of concealing and secreting their assets by various methods, including aliases and shell corporations. See *Hilao v. Estate of Ferdinand Marcos,* 25 F.3d 1467, 1480 (9th Cir. 1994); *Republic of the Philippines v. Marcos,* 862 F.2d 1355 (9th Cir. 1988); and *Republic of the Philippines v. Marcos,* 806 F.2d 344 (2nd Cir. 1986).

12. The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos.

13. Arelma was controlled by Ferdinand E. Marcos or his representatives during his lifetime.

14. Arelma served no legitimate purpose other than to hide the assets of Ferdinand E. Marcos.

15. There was complete disregard of Arelma's corporate identity by everyone who dealt with Arelma's business.

16. The sole deposit of $2 million into Arelma's Merrill Lynch account in November 1972 coincided with Marcos' declaration of martial law and the inception of massive *jus cogens* human rights abuses for which Marcos was responsible.

17. A Class of 9,539 human rights victims (or their heirs) have a final judgment against the Estate of Ferdinand E. Marcos for almost $2 billion, plus interest.

18. It would be unjust to prevent the Class of persons tortured, summarily executed and disappeared from receiving the proceeds of the Arelma account at Merrill Lynch to partially satisfy their judgment.

19. Golden Budha and Estate of Roxas have not proved that the assets in the Merrill Lynch account derived from assets allegedly stolen from them.

20. The judgments of Golden Budha and Estate of Roxas are against Imelda Marcos, not Ferdinand E. Marcos or his Estate.

21. Arelma cannot recover the proceeds of the account at Merrill Lynch since it was the *alter ego* and instrumentality of Ferdinand E. Marcos, and its claim is subordinate to the claim of the Class as judgment creditors of the Estate of Marcos.

22. Pimentel and the Class of Human Rights victims are entitled to the entirety of the interpleaded assets, and the Clerk of the Court is directed to transfer those assets to the account in the Clerk's Office established in MDL No. 840 pursuant to paragraph 10 of the Final Judgment of February 3, 1995 in that action.

DATED: July 12, 2004.

/s/
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 04-16401, NO. 04-16503 and NO. 04-16538

[Filed November 29, 2004]

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, Plaintiff.	)
vs.	)
ARELMA INC., et al., Defendants	)
The Golden Budha Corporation and Estate of Roger Roxas, Defendant-Appellants	)

Consolidated Appeals from the United States District Court
For the District of Hawaii
No. CV-00-00595 MLR

OPENING BRIEF OF DEFENDANTS-IN-INTERPLEADER/APPELLANTS THE ESTATE OF ROGER ROXAS AND THE GOLDEN BUDHA CORPORATION

WARD D. JONES
Pauahi Tower - Suite 460
1001 Bishop Street
Honolulu, Hawai'i 96813
Phone: (808) 550-4990
Fax: (808) 550-4991

ALEXANDER T. MacLAREN
Pacific Tower- Suite 2450
1001 Bishop Street
Honolulu, Hawai'i 96813
Phone: (808) 524-5500
Fax: (808) 536-8844

DANIEL C. CATHCART
MAGANA, CATHCART & McCARTHY
1801 Avenue of the Stars - Suite 600
Los Angeles, California 90067-5801
Phone: (310) 553-6630
Fax: (310) 785-9143

Attorneys for Defendants-in-interpleader/Appellants
The Estate of Roger Roxas and The Golden Budha
Corporation

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was entered on July 12, 2004. This appeal on behalf of Golden Budha and Estate of Roxas was timely filed on July 28, 2004.

ISSUES PRESENTED

Appellants Golden Buhda and Estate of Roxas present the following issues for adjudication on appeal:

1. Whether the probate exception precludes federal jurisdiction of this action in which the district court determined the fund to have been the property of the estate, determined priority among claimants to assets of the estate, and ordered distribution of assets of the estate?

2. Whether there exists the requisite adversity between the Pimentel claimants as to the fund and as to the other claimants to warrant jurisdiction of the Pimentel claimants when their claim is against the general assets of the Marcos estate, not the particular fund, while the claims of other claimants are asserted against the particular interpleaded fund?

3. Whether the district court committed prejudicial error when it relieved the prevailing claimant of the burden of establishing entitlement to the interpleaded funds, and instead imposed upon these Appellants the burden of establishing that the prevailing claimants are not entitled to the fund?

4. Whether the district court committed prejudicial error when it excluded the expert testimony of these Appellants' expert for failure to provide an expert report, when no report was required because the expert was not a retained expert and where he was deposed respecting his expert opinions such that there was no surprise and where these Appellants' offer to make him available for further questioning was not

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accepted?

5. Whether the district court committed prejudicial error when it excluded the deposition testimony offered by these Appellants as hearsay, when the depositions constituted prior testimony with respect to which parties with similar motives fully cross-examined the deponents?

6. Whether the district court erred in determining that these Appellants' claim was "junior" to the Pimentel claimants' claim?

7. Whether the district court erred in determining that Ferdinand E. Marcos was the legitimate owner of the interpleaded funds?

8. Whether the district court erred in determining that it would be unjust not to award the interpleaded funds to the Pimentel claimants?

STATEMENT OF THE CASE

This case is an interpleader case initiated by Merrill, Lynch, Pierce, Fenner & Smith ("Merrill Lynch"). Merrill Lynch deposited with the court $35 million dollars which was the product of $2 million deposited with it in 1972, by Arelma, Inc. Named as claimants (nominal defendants) in the case were these Appellants, Golden Budha and Estate of Roxas; Arelma, Inc. ("Arelma"), Philippine National Bank ("PNB"); Mariano J. Pimentel, as representative of a class ("Pimentel claimants"), The Republic of the Philippines and the Presidential Commission on Good Government ("PCGG"). Findings of Fact 2-6 (Excerpt of the Record

(("ER")) pp. 677-678). The latter two parties asserted sovereign immunity and were dismissed. Docket (ER p. 678). No other claimants participated at trial. Trial Trans., cover pages (ER pp. 598-599); Finding of Fact 6 (ER p. 678).

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wealth by use of dummy corporations. Buckley Depo.(ER pp. 89, 91, 94, 116-117).

The State Court Judgment

Roger Roxas and Golden Budha sued Ferdinand Marcos and Imelda Marcos in Hawai'i State Court in February 1988.[2] Ferdinand Marcos died on September 29, 1989. Finding of Fact 8 (ER p. 678). During the course of the action Imelda Marcos was substituted as representative of the Estate of Marcos pursuant to a substitution under Hawai'i Rules of Court Rule 25. *Roxas v. Marcos, supra,* Civil No. 88-052202. *See also,* Trial Trans. (ER p. 632-633). Roger died suddenly on May 25, 1993 on the day set for the commencement of trial. Cathcart Dec., para. 12 (ER p. 536). Judgment in the amount of $43 billion was entered against the Estate of Marcos. *Roxas v. Marcos, supra,* Civil No. 88-0522-02. On appeal, the Hawai'i Supreme Court affirmed the judgment of $6 million in favor of the Estate of Roger Roxas for his imprisonment and torture and ordered a new trial as to the value of the gold buddha and 17 small gold bars. That portion of the case was retried and the trial court determined the value to be slightly in excess of $13

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[2] *Roxas v. Marcos,* Civil No. 88-0522-02, State of Hawaii Circuit Court, First Circuit.

million. The Supreme Court also held that the substitution of Imelda as representative of the Estate was invalid because she had never been formally appointed by a court as administratrix of the estate, although she had been acting in that capacity. *Roxas v. Marcos,* 89 Haw. 91, 969 P.2d 1209, 1240 (1998). Accordingly, the judgment was altered to name Imelda Marcos in her personal capacity to the extent of her interest in the estate. Findings of Fact 38-39 (ER p. 683). Both sides have appealed to the Hawai'i Supreme Court for a second time. The Golden Budha and Estate of Roxas' appeal is based, in part, upon newly

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developed evidence that Imelda was, in fact, appointed administratrix of the Estate of Marcos by a Filipino Court. The appeal is currently pending before the Hawai'i Supreme Court.[3]

This court is requested to take judicial notice of the content of court records in the following 4 actions and the files therein, which bear on the factual and procedural history of this action, as official records capable of ready determination by sources whose accuracy cannot reasonably be questioned, pursuant to Rule 201(b)(2) of the Federal Rules of Evidence, namely: *Roxas v. Marcos,* Civil No. 88-0522-02, State of Hawaii Circuit Court, First Circuit, the action in which Golden Budha and Estate of Roxas obtained their judgment for the theft of the treasure and for the imprisonment and torture of Roger Roxas; *Roxas v. Marcos,* 89 Haw. 91, 969 P.2d 1209 (1998), the original appeal of the *Roxas v. Marcos* case; Hawaii Supreme Court,

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[3] Hawaii Supreme Court, Case No. 24605.

Case No. 24605, the pending appeal of the *Roxas v. Marcos* case; and *Hilao v. Estate ofMarcos,* MDL No. 840 (D.Haw. 1991), *affd* 103 F.3d 762 (1996), the action in which the Pimentel claimants obtained their judgment against the Estate of Marcos. *Paul v. Dade County, Fla.,* 419 F.2d 10, 12 (5th Cir. 1969), *cert den* 397 U.S. 1065 (Court of Appeals could take judicial notice of state action in which plaintiff had previously litigated issues sought to be raised in federal action); *State of Florida v. Charley Toppino & Sons, Inc.,* 514 F.2d 700, 704 (5th Cir. 1975) (district court could take judicial notice of records in related proceedings).

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Basis Of Claimants' Claims Against The Interpleaded Funds

These Appellants, Golden Budha and Estate of Roxas, are holders of the above-described Hawai'i State Court judgment in their favor for theft by Marcos from Roger Roxas of the treasure he discovered. They claim entitlement to the interpleaded funds as the owners of assets stolen and used by Marcos to fund the account. Trial Trans. (ER pp. 628-634).

Arelma is a Panamanian holding corporation, owned by Marcos, which funded the Merrill, Lynch account and in whose name the account was opened. It claims entitlement to the interpleaded funds as the owner of the account. The claim of the PNB is derivative of the Arelma claim. The Bank asserts that it holds the bearer shares of Arelma in escrow, subject to agreement of all parties or a decision of the Philippine Supreme Court, and makes no claim to the assets in its own name. Trial Trans. (ER pp. 613-618, 623-625).

Mariano J. Pimentel is the representative of a class of individuals who obtained a judgment against the Estate of Marcos for various torts committed against them under the Marcos administration.[4] They do not claim ownership of the fund. Their claim is based on their status as judgment creditors of Marcos. Trial Trans. (ER pp. 608-613).

The Republic of the Philippines and the PCGG claim the funds on behalf of the government of the Philippines.

Non-jury Trial

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This matter was heard before Judge Manuel Real. Trial Trans., (ER p. 598). Real is the same judge before whom the Pimentel claimants' underlying case was heard. *Hilao v. Estate of Marcos, supra,* MDL No. 840. The court excluded the testimony of every witness submitted by these Appellants. Trial Trans., (ER pp. 601- 608); Pretrial Order No. 9 (ER p. 55-57).

SUMMARY OF THE ARGUMENT

The district court's order purported to disburse assets which the court itself held to be property of the deceased Ferdinand Marcos. The assets were part of Marcos' estate. There is a well-recognized exception to federal court jurisdiction for probate matters. This matter should properly have been heard in state probate court.

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[4] Hilao v. Estate of Marcos, MDL No. 840 (D.Haw. 1991), *affd* 103 F.3d 762 (1996).

The federal court has no jurisdiction of the Pimentel claimants in this interpleader case because they lack the required adversity as to the interpleaded fund and as to the other parties. A claimant in interpleader must have a claim against the particular interpleaded funds. A general judgment against the holder or owner of a stake does not qualify as a claim against the stake. They assert no prior ownership right to the fund. The Pimentel claim judgment creditor claim against Marcos' assets is not adverse to or inconsistent with the claims of the other claimants who assert ownership rights to the particular fund.

The Pimentel claimants had the burden to prove every element necessary to establish their right to the particular fund and their relative priority as to all other claimants to the interpleaded fund. Inasmuch as the Golden Budha and Estate of Marcos asserted priority based on their assertion that the funds were not the legitimate property of Marcos, but rather were stolen funds or the product of stolen funds, as to

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district court, as discussed below, would have established that Marcos had no legitimate means of acquiring massive wealth (Buckley Depo. (ER p. 63)), that his transferring of assets into dummy corporations was part of a pattern of concealment (Buckley Depo. (ER pp. 89)), that the most likely source of the bulk of his wealth was the Japanese treasure discovered by Roxas (Buckley Depo. (ER pp. 91-99)), and that both he and the PCGG concluded that the money which funded the Arelma account was ill-begotten (Buckley Depo. (ER pp. 111-116)).

The Pimentel claimants were required to prove that the assets that funded the Arelma account, which funded the Merrill Lynch account, were lawfully owned by Marcos both to establish the elements of their entitlement to the specific fund in the Merrill Lynch account and to establish their priority over the claims of the Roxas claimants. They failed to do so and the award must be reversed.

IV. THE DISTRICT COURT'S EXCLUSION OF THE EXPERT TESTIMONY OF JOHN W. BUCKLEY, A FORENSIC ACCOUNTANT, WAS ERRONEOUS AND PREJUDICIAL.

John W. Buckley ("Buckley"), a forensic accountant, was identified as a witness by the Roxas claimants in their Pre-trial Statement.[15] The statement identified Buckley as a forensic accountant and described the scope of his investigation, pursuant to previous employment, and the scope of the opinion testimony he would offer.[16] At the request of counsel for the Pimentel claimants to accommodate his

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[15] Contrary to the representation of counsel for Appellants to the court in its Notice of Hearing on Defendant Pimentel's Motion In Limine, Buckley was not identified as a "fact witness," but as a "witness." *See* Pretrial Statement, (ER p. 23).

[16] The Pretrial Statement recited: "Mr. Buckley is a forensic accountant employed by the PCGG to examine Marcos accounts, records and tax returns. Mr. Buckley will testify that the earnings of Mr. and Mrs. Marcos prior to 1972, and thereafter, would not permit them to lawfully acquire the funds deposited into the Arelma account with Merrill Lynch. He concludes that those funds had to be stolen from others." exh. 9, Buckley Depo. (ER pp. 67-68.)

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travel schedule, Mr. Buckley's deposition was taken on short notice January 17, 2002, more than a year and a half before the pretrial conference. Cathcart Dec., paras. 2-4 (ER p. 34); Buckley Depo. (ER pp. 67-68).

In correspondence dated March 26, 2002, Appellants' counsel wrote to the Pimentel claimants' counsel. He stated his doubts that Buckley was subject to the report requirement and offered, if counsel felt that the Pimentel claimants had been disadvantaged so as not to be able to take a full and complete deposition of Mr. Buckley, to make him available for further examination. Cathcart Dec., para. 7, exh. 3 (ER p. 34). That offer was never accepted.

At the pretrial conference, held on September 29, 2003, the court granted the Pimentel claimants' motion to exclude the testimony of Buckley as an expert witness on the ground that no expert report had been tendered, contrary to Federal Rules of Civil Procedure 26 (a)(2)(A). Buckley would be allowed to testify as a fact witness, "but not [to] the conclusions which he draws." Pretrial Conf. Trans. (ER pp. 44-46); Pretrial Order No. 9 (ER p. 56).

A. John W. Buckley Was Not Required To Submit An Expert Report Under Federal Rules of Civil Procedure 26(a)(2)(A).

Rule 26(a)(2)(B) authorizes certain experts to offer expert testimony at trial without submitting an expert report. The report requirement does not apply to expert opinions concerning information a witness obtains as an actor or viewer rather than as an expert retained to form opinions in anticipation of trial.

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Rule 26(a)(2)(B) provides:

> (B) .... this Disclosure [of expert witnesses] shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report.... (Emphasis added.)

The Advisory Committee on the 1993 amendments to Rule 26[17] noted the limited applicability of the report requirement and offered an example of an expert who would not be required to report. They wrote:

> The requirement of a written report in Paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement of a written report.

The court in *Brown v. Best Foods,* 169 F.R.D. 385 (N.D. Ala. 1996) summarized the import of the rule:

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[17] The pre-1993 version of Rule 26 excepted those who formed their opinions not in preparation for trial, but as actors or viewers. The post-1993 version excepts those who are not retained or specially employed. The rules express the same standard. The reasoning of courts under the earlier version of the Rule remains valid. *Zurba v. United States,* 202 F.R.D. 590, 592 (N.D. Ill. 2001).

> "Rule 26(b)(4) [footnote omitted] anticipates that not all expert witnesses will prepare reports, and allows the taking of depositions of non-reporting experts." [citations omitted] In other words, "[e]very witness offering testimony under the Federal Rules of Evidence 702, 703 and 705 is not 'retained' or 'specially employed' to provide expert testimony," [citation omitted] and therefore Rule 26(a)(2)(B) does not require all expert witnesses to prepare and sign a written report, but does allow a defendant to take this person's deposition.
> Brown v. Best Foods, supra, 169 F.R.D. at 387.

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The report requirement does not apply to Mr. Buckley, whose opinions were formed in the course of other employment long before this action, and who was not retained by the Roxas claimants to form opinions in anticipation of this case. As was developed in his deposition and was recited to the District Court in argument on the motion to exclude, Mr. Buckley is a forensic accountant who was hired by the PCGG for about a year in 1988 or 1989, more than ten years before this lawsuit was filed, to examine documents relating to Ferdinand Marcos' assets and create a document that could be used by the PCGG to pursue those assets. He reviewed massive numbers of financial records, including earnings statements and assets statements of Marcos and his family. Buckley Depo. (ER pp. 79-84, 106). When he came across organizations or people or bank account numbers or money transfers he entered them into a database from which he produced a compendium of leads for further investigation. Buckley Depo. (ER p. 63).

Under Rule 26 a witness is not subject to the expert report provision if(1) his expert opinion is based on observations made during the course of his employment; (2) the opinion was not "acquired or developed in anticipation of litigation or for trial;" and (3) the opinion is based on the personal observations of the witness. *Brown v. Best Foods, supra,* 169 F.R.D. at 387; *Zurba v. United States,* 202 F.R.D. 590, 592 (N.D. Ill. 2001). The law concerning experts who are excused from the report requirement has been developed largely in the context of treating physicians. So long as treating physicians acquire their opinions through treatment of a patient, rather than in preparation for trial, they may state their opinions and inferences without becoming retained experts and cannot be forced to file the written reports required under Rule

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26(a)(2)(B). *Washington v. Arapahoe County Dept. of Soc. Services,* 197 F.R.D. 439, 442 (D. Colo. 2000); *Brown v. Best Foods,* 169 F.R.D. 385, 387 (N.D. Ala. 1996); *Salas v. United States,* 165 F.R.D. 31, 33 (W.D.N.Y. 1995).

In considering the scope of expert testimony a doctor may offer without becoming a retained expert, one court noted that, "[D]octors do not operate in a vacuum. In order to properly treat and diagnose a patient, a doctor needs to know, establish, or reach a conclusion regarding the cause of the patient's injury." *McCloughan v. City of Springfield,* 208 F.R.D. 236, 242 (C.D. Ill. 2002). Included within the permissible opinion of a treating physician are causation of the injuries, diagnosis of the injuries, and prognoses regarding future disability. *Salas v. United States, supra,* 165 F.R.D. at 33-34; *Kirkland v. Union Pacific Railroad,* 189 F.R.D. 605, 608 (D. Nev. 1999).

The exception for non-reporting experts is not limited to treating physicians. Rule 26 itself describes non-reporting experts as those who are not retained or specially employed, without qualification. The Note of the Advisory Board cites a treating physician only as an "example" of an expert who may testify at trial without a written report. Indeed, the report exception has been applied to firemen as well. In *Brandt Distributing Co. v. Federal Ins. Co.*, 247 F.3d 822 (8th Cir. 2001), the court held that there was no violation of Rule 26(a)(2) when a fire captain who had not provided an expert report testified at trial to his opinion regarding the fire because he conducted his investigation and prepared his report in the course of his employment with the fire department, not on behalf of a party. *Id.* at 826.

Like the treating physicians and the fire captain, Buckley was not a retained

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expert, but an actor or viewer due to his independent employment which was not in anticipation of litigation. He was employed by PCGG to conduct an investigation years before this lawsuit commenced. The opinions he formed during the course of that employment long ago were not developed for this lawsuit. His opinion that the source of Marcos assets was from looting was set forth in documentation that he prepared his employment with the PCGG and was based on his personal observation of thousands of the Marcos' financial documents as an actor in the PCGG's investigation. Clearly, his conclusions were not reached at the behest of counsel for the Roxas claimants in anticipation of this lawsuit. He was not hired by them to conduct any investigation, to prepare any report or to form any new opinions for this litigation.

The scope of Mr. Buckley's opinion testimony that Marcos' assets were stolen and the most probable source of the money with which Marcos funded the Merrill Lynch account was the Japanese treasure is within the permissible scope of a non-reporting expert. In *Brandt Distributing Co., Inc. v. Federal Ins. Co.*, 247 F.3d 822 (8th Cir. 2001) the fire captain testified that the fire was set for fraudulent purposes. The court noted:

> His testimony reflected the circumstances weighed against other possible reasons for an arson fire, such as a random act of vandalism or an act of revenge. Captain Gronemeyer's testimony was a logical inference from his report.
> *Id.* at 826.

The court concluded that the captain, who testified on behalf of the insurance company, was not a retained expert. No report was required, *Id.* As a doctor looks to the cause of injuries he treats and a fireman to the cause of fires he fights, a forensic

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account looks to the source of funds he investigates. His testimony weighing and evaluating the possible sources of Marcos' assets was a logical inference from his employment.

Mr. Buckley's status as a non-reporting expert fits the persuasive rationale offered by one court for not requiring written reports from unretained experts.

> The unretained experts, who formed opinions from pre-litigation observation, invariably have files from

> which any competent trail attorney can effectively cross-examine. The retained expert... has no such files, and is thus required to provide the report to enable effective cross examination. This reading puts unretained experts, because of their historical file, and retained experts, because of the required report, on equal footing for cross-examination purposes. *Sprague v. Liberty Mutual Ins. Co.,* 177 F.R.D. 78, 81 (D. N.H. 1998).

Mr. Buckley did have historical documentation of his investigation, on which he compiled data and documented his opinions as he reached them. Pertinent pages of that compendium were produced at the deposition and used by counsel to conduct cross-examination.[18] Buckley Depo. (ER pp. 68-70, 76-87).

Paying an expert witness to attend a deposition or testify in court, to write a summarizing letter or to review notes prior to testifying does not amount to retaining a witness as an expert. *Hall v. Sykes,* 165 F.R.D. 46, 48-49 (E.D. Va. 1995). Buckley was first called by counsel for the Roxas claimants about a week before the deposition. In preparation for the deposition he located a copy of his compendium and spent half an hour on the day of the deposition reviewing a few documents which he had seen before or prepared himself. Buckley Depo. ER p. 105). He testified that

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[18] The compendium produced at Buckley's deposition set forth his conclusion that the money that funded Arelma's account at Merrill Lynch was derived from at least $20 million of "looted" money that was placed in a Mahler Foundation or Establishment account in Switzer land by Marcos using an alias. Buckley Depo. (ER pp. 80-81).

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he would charge for "whatever time I spent preparing for it [the deposition], which was very little." Buckley Depo. (ER pp. 91, 106).

Mr. Buckley was not a retained expert. No expert report was required of him, and the district court erred in excluding his testimony for failure to provide a report.

B. Even Had A Report Been Required Of Mr. Buckley, The Court Abused Its Discretion And Violated Rule 37 By Excluding The Expert Testimony Because The Failure To Provide A Report Was Neither Unjustified Nor Harmful.

Federal Rules of Civil Procedure Rule 37, which sets forth sanctions for failure to provide discovery, provides that no sanction should be imposed if there was substantial justification for the non-disclosure, or if the non-disclosure was harmless.

Rule 37(c)(1) states:

> A party that without substantial justification fails to disclose information required by Rule 26(a)... is not, unless such failure is harmless, permitted to use as evidence at a trial... any witness or information not so disclosed.

According to the court in *Sherrod v. Lingle,* 223 F.3d 605 (7th Cir. 2000):

> ... Rule 37 precludes the trial judge from imposing the exclusion sanction unless it finds the party's

> failure to comply with Rule 26(a) was both unjustified and harmful to the opposing party.
> *Sherrod, supra,* at 612 (emphasis added).

The court concluded:

> Because Rule 37 does not require sanctions against a non-disclosing party if that party's violation was harmless, the district court abused its discretion by excluding Sherrod's experts without any indication that the defendants had been harmed by his discovery violation.
> *Sherrod, supra,* at 613 (emphasis added).

Some factors courts consider in determining the propriety of sanctions under

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Rule 37 include: (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date. *David v. Caterpillar Inc.*, 324 F3d. 851, 857 (7th Cir. 2003); *Nalder v. West Park Hospital,* 254 F.3d 1168, 1177-1178 (10th Cir. 2001); *Crismonia v. Parkway Mortgage, Inc.*, 286 B.R. 604, 611 (E.D. Pa. 2002).

i. prejudice or surprise

Failure to comply with Rule 26 will not result in exclusion of the expert's testimony unless the failure is demonstrated by the party seeking exclusion to have been prejudicial. *Lohrenz v. Donnelly,* 223 F.Supp.2d 25, 35 (D.

Dist.Col. 2002); *Verzwyvelt v. St. Paul Fire & Marine Ins. Co.*, 204 F.R.D. 309, 311 (W.D. La. 2001). In *Lakeman v. Otis Elevator Co.*, 930 F.3d 1547, 1554 (11th Cir. 1991) experts testified not only regarding the dangerousness of certain chemicals and the cause of death but also regarding the adequacy of labels, which subject had not been disclosed in the expert report. The court found there was no prejudice because counsel was well-versed in the labeling of toxic chemicals and was capable of cross-examining the experts effectively. In *Farmland Industries v. Morrison - Quirk Grain Corp.*, 54 F.3d 478, 482 (8th Cir. 1985) (emphasis added) there were deficiencies in the expert designation, however the witness was redeposed. The court declared, "This additional deposition provided Morrison with adequate information to cure any deficiencies in [the] designation. Morrison was neither surprised nor confused at the substance of [the expert's] testimony. This lack of surprise prevented prejudice from occurring."

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Buckley's identity as a witness was disclosed early in the case. He was deposed more than two years before the trial. During his deposition he described the opinions to which he would testify. His bio-bibliography and samples of the documentation he created in the course of his investigation were produced at the deposition and used for cross-examination. Contrary to counsel's claim at argument on the motion, Buckley was not deposed as a fact witness, but as an expert witness.[19] Little of the matter to which he testified

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[19] Mr. Buckley's 17 page bio-bibliography was attached to the deposition. Buckley Depo., exh. 1 (ER pp. 120-136). His experience as an expert witness was thoroughly inquired into,

was new to deposing counsel and none of it was surprising, as the scope of the investigation and the opinions to which Buckley would testify had been described in a pretrial statement. Moreover, the matter to which Buckley testified was not technically challenging. No scientific tests or experiments were involved. Counsel was capable of and did conduct a competent deposition during which he learned to the opinions to which Buckley would testify and the bases for them. The Pimentel claimants made no showing of prejudice.

Moreover, the Pimentel claimants waived the right to receive a report before the deposition by conducting the deposition without it, in violation of the mandatory provision of Rule 26 that, "Ifa report from the expert is required..., the deposition shall not be conducted until atter the report is provided." The mandatory language of the rule prohibits the taking of an expert deposition of an expert who is required to

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including the number of times he qualified as an expert witness, the number of times he testified as an expert in court and in deposition, the areas in which he has qualified as an expert, and the percentages of his retention for plaintiffs and defendants.

Mr. Buckley was deposed about the scope of his investigation, the identification of all individuals with whom he worked, the nature and time frame of the documents that he reviewed, and the access he was afforded to various financial records.

Mr. Buckley was asked classic expert deposition questions as to his conclusions and the bases for them. *See e.g.*, Buckley Depo. (ER pp. 75-77, 79, 89, 91, 97-98).

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report unless a report has been produced in advance of the deposition. The obvious purpose of the rule is to protect the deposing party from surprise. If a party proceeds with a deposition, it has, of necessity, waived the right to receive a report in advance, because it cannot be given in advance once the deposition has been taken.

ii. the ability of the opposing party to cure the prejudice

Even actual prejudice to an opposing party can be cured, and it is the opposing party's obligation to attempt to cure any prejudice. In *Crismonia v. Parkway Mortgage Inc.*, 286 B.R. 604, 611 (E.D. Pa. 2002) the court stated:

> Assuming a trial court determines that an opposing party would be unfairly prejudiced or surprised by admitting the evidence, the inquiry does not end. The trail court must determine whether the unfair surprise or prejudice is curable.

Another court observed:

> Notwithstanding Rule 37(c), the district court may be found to have abused its discretion if [its] exclusion of testimony results in fundamental unfairness in the trial of the case .... [T]he pivotal issue is whether admission of the evidence will result in incurable prejudice to the resisting party.
> *ABB Air Preheater, Inc. v. Regenerative Environmental Equip. Co. Inc.*, 167 F.R.D. 668, 672 (D. N.J. 1996).

In *Crismonia* the court noted that prejudice can be cured by reopening discovery, permitting the deposition of the expert, granting time to review new expert testimony, permitting the opposing party to counter new expert testimony with expert testimony and permitting the retention of an expert, if necessary. The court concluded, "Exclusion is too drastic a remedy if the prejudice may be readily cured." *Crismonia v. Parkway Mortgage Inc., supra,* 285 B.R. at 611-12.

Parties are required to take steps to overcome prejudice. They are not allowed

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to sit back until trial and then ask the court to exclude their opponent's evidence. In *Intercargo Ins. Co. v. Burlington Northern Santa Fe Railroad,* 185 F.Supp.2d 1103, 1107 (C.D. Cal. 2001) the court refused to exclude expert testimony because the defendant had not sought to compel a more adequate disclosure within a reasonable time. *Id.* In *Nalder v. West Park Hospital,* 254 F.3d 1168, 1178 (10th Cir. 2001) the party failed to ask for a continuance of the trial.

> Thus, plaintiffs never made what likely would have been a successful attempt to cure (or at least mitigate) the alleged prejudicial impact of [the expert's] testimony. A party that has an opportunity to depose an expert, or hire proffered experts but chooses not to, cannot claim unfair surprise.

See also, Porchia v. Design Equip. Co., 113 F.3d 877, 882 (8th Cir. 1997).

Had there been any prejudice to the Pimentel claimants in spite of their having deposed Buckley, there was ample time and opportunity to cure any prejudice. The Pimentel claimants took no steps to do so in spite of a written offer to redepose the witness. They did not seek, either informally or by motion, to obtain more information from the expert witness or to redepose him.[20] They have neither claimed prejudice nor sought to cure any perceived prejudice.

iii. the likelihood of disruption of trial

Courts have shown themselves willing even to delay trial and reopen discovery

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in order to cure surprise or prejudice so that matters may be decided on the evidence. In *Johnson Electric N. Am., Inc. v. Mabuchi Motor Am. Corp.*, 77 F.Supp.2d 446, 458-59 (S.D.N.Y. 1999) the court noted that the court could have

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[20] Counsel for the Pimentel claimants made exactly this argument in favor of deposition testimony he sought to have admitted. Counsel for Arelma/PNB objected to the admission of the deposition testimony on the grounds that they had not been parties to the action when the deposition was taken, had no notice of the deposition and no opportunity to participate. Counsel for the Pimentel claimants argued to the court, "Well, it's true that they weren't a party as of that date. However, they had an opportunity, some two and-a-half years, to examining [the deponent]. In addition, I furnished [counsel for Arelma/PNB] with a copy of the transcript and exhibits after he did come into the case, and Merrill Lynch, I think has represented, Your Honor, that it stood ready, willing, and able during its participation to assist in discovery." Trial Trans. (ER pp. 644-645).

adjourned the hearing, particularly in a bench trial, but the objecting party did not request adjournment and therefore aid not establish prejudice. *See also, Crismonia v. Parkway Mortgage Inc., supra,* 286 B.R. at 612; *McNerney v. Archer Daniels Midlands Co.,* 164 F.R.D. 584, 587 (W.D.N.Y. 1995). In this case, there would have been no delay. Cure, if any were necessary, could have been accomplished in the two years between Buckley's deposition and the trial.

iv. bad-faith or willfulness of the proponent of the evidence

The exclusion of critical evidence is an extreme and drastic sanction, not normally to be imposed absent a showing of willful deceit or flagrant disregard of a court order by the proponent of the evidence. *Meyers v. Pennypack Woods Ownership Ass'n,* 559 F.2d 894, 905 (3d Cir. 1977) *reversed on other grounds* 777 F.2d 113 (3d Cir. 1985); *Bucher v. Gainey Transportation Serv. of Indiana, Inc.,* 167 F.R.D. 387, 389 (M.D. Pa. 1996); *McNerney v. Archer Daniels Midlands Co., supra,* 164 F.R.D. at 587. In this context, lack of diligence does not constitute bad faith. *ABB Air Preheater, Inc. v. Regenerative Environmental Equip. Co. Inc., supra,* 167 F.R.D. at 673.

Courts have recognized a concept of sanction proportionality to the infraction. *Sherrod v. Lingle,* 223 F.3d 605, 612 (7th Cir. 2000). Considering an exclusion ordered by the trial court for expert disclosure failures, the court declared that the sanction must be "proportionate to the infraction." The Court of Appeals reversed the

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district court's exclusion of the expert testimony, noting, among other things, that because both sides were at fault for scheduling difficulties, the delay in finishing the experts' reports was partially justified, *Id.* at p. 613. In *Johnson Electric N. Am., Inc. v. Mabuchi Motor Am. Corp., supra,* 77 F.Supp.2d at 459 the court held that an assertion of privilege, though in error, was not so baseless as to warrant the drastic sanction of striking the testimony.

Although it appears clear to these Appellants that Buckley was not a retained expert and therefore not subject to the report requirement, should the Court conclude that Buckley is subject to the report requirement, the question must be considered close enough to preclude bad faith and to render exclusion of the testimony disproportionate to the infraction, particularly in the context of this case where the district court excluded virtually all of the Roxas claimants' evidence, thereby depriving them of the opportunity to present their case.

The pretrial statement accurately described the opinion testimony it was expected Buckley would offer, which he did in fact offer when his deposition was taken. Moreover, following the deposition, approximately a year and a half before the pretrial conference, counsel for the Roxas claimants communicated to opposing counsel his doubts that Buckley was subject to the report requirement and offered the witness for redeposition. There was no ambush, there was no bad faith or gamesmanship except on the part of the Pimentel claimants who waited all that time and then moved to exclude Buckley's testimony at the pretrial conference. The exclusion of Buckley's expert testimony, when there

was substantial justification and in the absence of bad faith was a violation of the provisions of Rule 37(c)(1) and an

[p. 42]

abuse of discretion.

The erroneous exclusion of Buckley's expert testimony was prejudicial to the Roxas claimants because Buckley's testimony was vital to arguments central to their claim - namely that they have an ownership claim to the stake because it was funded with assets stolen from them, and that title to stolen property does not pass to a thief. Exclusion of Buckley's testimony was also prejudicial because it would have defeated an element of the Pimentel claim - namely, that the Marcos assets in the fund were legitimately acquired and subject to their general tort claim.

Buckley's testimony refuted the court's erroneous determination that there was no evidence that the Marcos accounts were funded with stolen assets, upon which judgment in favor of the Pimentel claimants depends. *See* Amendment to Finding of Fact 14 (ER p. 690); Conclusion of Law 12 (ER p. 687); and Conclusion of Law 19 (ER p. 688). Buckley testified that the funds were ill-gotten and that their most probable source was the Japanese treasure discovered by Roxas. He also testified that both he and the PCGG identified the money that funded the Arelma account as ill-gotten gains. Buckley Depo. (ER pp. 80-81, 83, 89, 91, 98, 111, 114-115.) The excluded testimony also included the following:

> I don't care how successful Mr. Marcos was as an attorney, you don't generate wealth in the millions of dollars and billions of dollars ..... So it came from

> somewhere. The most likely source, the most probable source, is the treasure that the Japanese left buried in [the Philippines] when they exited the country.
> Buckley Depo. (ER p. 91).

After testifying to the trail of the money from Marcos to Switzerland to Panama to

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New York,[21] Buckley further testified:

> ... it follows a pattern in which he set up a lot of what I call dummy corporations and transferred assets into them. And this is not atypical of people who are trying to hide monies. So if you happen to find one pot of gold, then you may miss the others. So I think it was part of a general pattern of concealment.
> Buckley Depo. (ER p. 89).

Buckley also testified regarding the Japanese treasure hidden in the Philippines:

> I don't think there's any doubt it existed. And it was the source of - - the bulk of Marcos' wealth which his own colleague, "Zobel," estimated in excess of a hundred billion dollars... Marcos himself tried to sell gold worth -- as I recall, in excess of a trillion dollars worth of gold... I know that he was dealing

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[21] See Buckley Depo. (ER p. 63).

with a group of Australians that were acting as brokers. Buckley Depo. (ER p. 97).

The proof of the theft of the treasure from Roxas by agents of Ferdinand Marcos was established at trial in *Roxas v. Marcos*.[22] Buckley's testimony provides the link between the treasure stolen from the Roxas claimants and the money in the Merrill Lynch account. The exclusion of Buckley's expert testimony was prejudicial error that precluded the establishment of essential elements of the Roxas claimants' case.

V. THE COURT APPLIED AN ERRONEOUS STANDARD AND EXCLUDED DEPOSITION TESTIMONY CONTRARY TO THE HEARSAY EXCEPTION FOR PRIOR TESTIMONY.

At the Pretrial Conference held on Sept. 29, 2003, the Pimentel claimants and Arelma/PNB moved the court to exclude the deposition testimony of Danilo Roxas,

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[22] *Roxas v. Marcos*, Civil No. 88-0522-02, State of Hawaii Circuit Court, First Circuit.

APPENDIX H

MAGAÑA, CATHCART & MCCARTHY
Trial Lawyers Since 1946

Suite 600
1801 Avenue of the Stars
Los Angeles, California 90067-5801
310.553.6630 • 800.742.1019 • FAX 310.407.2295
www.mcmc-law.com • info@mcmc-law.com

December 7, 2006

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103

In re: Merrill Lynch etc. vs. Arelma, S.A., et al.
Appeal Numbers: 04-16401, 04-16503, 04-16538
Notice of Related Cases (FRAP 28-2.6)

Dear Clerk:

It has come to my attention that the claims of appellee, Mariano Pimentel, to the interpleaded fund are barred by the statute of limitations on judgments. H.R.S. 657. Judgment was rendered in MDL 840 on February 3, 1995. The ten-year statute of limitations ran on February 3, 2005 while this action was pending. The record indicates that

counsel for the class, in M.D.L. 840, applied to the trial court for an extension AFTER the statute had run. This is not permitted under the language of the statute. As a result, there is an appeal pending in this Court beating Appeals Docket #: 06-16301.

Obviously, the Estate of Roger Roxas and The Golden Budha Corporation wish to urge the application of the Hawaii statute which conclusively presumes that the judgment has been paid in full.

Most respectfully,

/s/
DANIEL C. CATHCART

DCC:tr

cc: Jeffrey S. Portnoy, Esq.
Cades Schutte Fleming & Wright
-and-
A. Robert Pietrzak, Esq.
Sidley Austin Brown & Wood, LLP
Attorneys for MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED

Supreme Court, U.S.
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(2)

No. 06-1039

In the Supreme Court of the United States

THE ESTATE OF ROGER ROXAS
AND GOLDEN BUDHA CORPORATION,

Petitioners,

v.

MARIANA J. PIMENTEL, on behalf of himself and all other persons similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.

STEPHEN V. BOMSE
Counsel of Record
RACHEL M. JONES
ADAM J. GROMFIN
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

Counsel for Respondents Republic of the Philippines and Philippine Presidential Commission on Good Government

KENNETH S. GELLER
CHARLES A. ROTHFELD
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents Philippine National Bank and Arelma Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Ninth Circuit should have entertained an interpleader action initiated to settle ownership of assets stolen by Ferdinand Marcos while he was President of the Republic of the Philippines.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondents state that the Philippine National Bank (PNB) is a publicly traded corporation, in which the Republic of the Philippines has a minority ownership interest. PNB has no parent corporation and no publicly held company owns 10% or more of its stock. Arelma, S.A., which has been incorrectly referred to as Arelma Inc. throughout this litigation, is a Panamanian corporation whose shares are held in escrow by PNB. The Republic of the Philippines and the Philippine Presidential Commission on Good Government, as governmental entities, are exempt from Rule 29.6.

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STATEMENT

The Republic of the Philippines, the Philippine Presidential Commission on Good Government ("PCGG"), the Philippine National Bank ("PNB"), and Arelma, Inc., are claimants to the assets at issue in this interpleader action and are subject to the Ninth Circuit judgment challenged by petitioners Estate of Roger Roxas and Golden Budha Corporation (collectively "Roxas").[1] The Republic, the PCGG, PNB, and Arelma have filed their own joint petition for certiorari, raising a different set of challenges to that judgment. No. 06-1204, *Republic of the Philippines* v. *Pimentel*. Pursuant to Rule 12.6 of the Rules of this Court, they file this brief as respondents in opposition to the Roxas petition. See Robert L. Stern *et al.*, SUPREME COURT PRACTICE 390-391 (8th ed. 2002).

1. The petition in this case grows out of a dispute over ownership of a subset of the assets that were stolen by Ferdinand Marcos while he was President of the Republic of the Philippines – the so-called "Arelma assets," which are shares of a Panamanian shell corporation created by Marcos that controlled a trading account at Merrill Lynch, Pierce, Fenner, & Smith.[2] The petitioners here, the estate of Roger Roxas and the Golden Budha Corporation, contend that Marcos stole the funds used to capitalize Arelma from them. The Republic and the PCGG maintain that the assets Marcos used to create Arelma were public funds that at all times have been owned by the Republic. A third group of claimants is a class of Philippine victims of the Marcos dictatorship (the "Pimentel class"), which won a near-$2 billion judgment against the Marcos estate in the United States District Court for the Dis-

[1] The Golden Budha corporation carries a misspelled name "for reasons connected with the warrants issued to Roxas." No. 06-1204, Pet. App. 23a.

[2] As explained below, the shares of Arelma have been transferred to an escrow account at PNB, which now controls the corporation.

trict of Hawaii. See *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). In contrast to the Republic and Roxas, the Pimentel class does not assert that it has any special ownership interest in the assets used to create Arelma; instead, the class stakes its claim as a general creditor of the Marcos estate.

As the Republic and PNB explain in more detail in their petition for certiorari (at 2-3), the recovery of assets stolen by Marcos – many of which had been secreted in Switzerland – is a matter of the greatest urgency to the Republic. In 1986, Swiss authorities, responding to a request from the Philippine government, froze Marcos-related assets in Switzerland, including the shares of Arelma. Because there was no doubt about the illegal provenance of these assets, in 1995 Swiss authorities acceded to the Republic's request that the assets be transferred to PNB, to be held in escrow pending final determination of ownership by the Philippine courts. When the transfers were challenged by the entities controlling the assets, including Arelma, the Swiss Supreme Court affirmed. See *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc, et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997); *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997 (Swiss Fed. Sup. Ct. Jan. 7, 1998); *In re Aguamina Corp.*, No. 1A.31, 41/1998 (Swiss Fed. Sup. Ct. Mar. 12, 1998); *Fed. Police Dept.* v. *Aguamina Corp.*, No. 1A.87/1997 (Swiss Fed. Sup. Ct. Dec. 10, 1997).

The Swiss court authorized the transfer on the express condition that "[t]he Republic of the Philippines guarantee to decide about the seizure or restitution of the assets to the entitled parties, respectively, in judicial proceedings which satisfy [certain] procedural principles." *Fed. Office*, *supra*, at 10. The court added that this determination "must be taken in the Philippines where the criminal actions were committed." *Republic of the Phil.*, *supra*, at 217. In reaching this conclusion, the Swiss court specifically addressed the claims of the Pimentel class, holding that the Pimentel claimants were not

entitled to attach assets held by Marcos in Switzerland. Instead, the Swiss court determined that "the victims of the Marcos regime as a matter of principle are obliged to either participate in the probate proceedings [in the Philippines] if they want to assert Ferdinand Marcos' personal responsibility for the human rights violations committed during his tenure, or they have to claim damages from the Philippine government for the wrongs committed by its organs." *Fed. Office*, *supra*, at 28.

2. For more than fifteen years, the Republic and the PCGG have been seeking to settle ownership of the Marcos-related Swiss assets through forfeiture proceedings litigated against the Marcos estate in the Sandiganbayan, the Philippine anti-corruption court, and the Philippine Supreme Court. These proceedings are consistent with the orders of the Swiss Supreme Court. In 2003, the Philippine Supreme Court ruled for the Republic and the PCGG, holding that the Swiss assets belong to the Philippine government. *Republic of the Phil.* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003). Denying a motion for rehearing by the Marcos estate and heirs, the court emphasized:

> Petitioner Republic has a right to a speedy disposition of this case. It would be readily apparent to a reasonable mind that respondent Marcoses have been deliberately resorting to every procedural device to delay the resolution hereof. There is justice waiting to be done. The people and the State are entitled to a favorable judgment, free from vexatious, capricious, and oppressive delays, the salutary objective being to restore the ownership of the Swiss deposits to the rightful owner, the Republic of the Philippines, within the shortest possible time.

Rep. of the Phil. v. Honorable Sandiganbayan, G.R. No. 152154 (Phil. Nov. 18, 2003), at 10.

When the PCGG initially brought its forfeiture action

before the Sandiganbayan, it specifically listed Arelma and the Merrill Lynch account as the product of illegal activity that have at all times belonged to the Philippine government. ER0106, 0174-0251.[3] Although the Philippine Supreme Court's decision in the forfeiture proceeding unequivocally favored the Republic's legal claim regarding all of Marcos's Swiss property, it did not expressly mention the Arelma assets. The PCGG therefore filed a motion before the Sandiganbayan seeking a clarification that the Arelma assets indeed were forfeit to the Republic. That litigation, which will conclusively determine ownership of the Arelma assets as a matter of Philippine law, is now pending before the Sandiganbayan and will be resolved by that court or the Philippine Supreme Court.

3. In 2000, after the Swiss Supreme Court confirmed the transfer of Marcos' Swiss assets to the Philippines, the Republic asked Merrill Lynch to send the Arelma account to PNB, to be held in escrow pending a determination of ownership by the Philippine courts. Because a representative of the Marcos family also asserted entitlement to the assets at that time, Merrill Lynch declined the request, stating that it "would prefer to await an adjudication of ownership of the Arelma shares by the Philippine courts which is final and binding on the parties with conflicting claims, and to consider the request for release based on corporate action and instructions given thereafter." ER0393-0395.

At the same time, however, the Pimentel class, which was seeking to satisfy its $2 billion judgment against the Marcos estate, also claimed the assets as judgment creditors of the estate. In response to that claim, Judge Manuel Real, the district judge who had presided over the Pimentel class litigation in Hawaii, directed Merrill Lynch t appear before

[3] ER refers to excerpts of record filed in the Ninth Circuit by the Republic and the PCGG in No. 04-16401, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Republic of the Philippines*.

him. ER0388-0391. Although the Arelma account and assets had no connection with Hawaii, Judge Real – in an *ex parte*, sealed proceeding – directed Merrill Lynch to commence an interpleader action there to settle ownership of the Arelma assets. ER0031-0032. The action originally named as defendants, among others, the Republic, the PCGG, PNB, Roxas, and the Pimentel class. No. 06-1204, Pet. App. 31a. At the Ninth Circuit's direction, Judge Real dismissed the Republic and the PCGG from the interpleader suit on sovereign immunity grounds.[4] But in their absence, he proceeded to award the Arelma assets to the Pimentel class in their entirety. *Id.* at 43a-54a.

That was not the first procedural oddity in Hawaii federal court relating to litigation about the Marcos assets. Judge Real initially ruled that the Republic was an "aider and abettor" of the Marcos estate and purported to enjoin the Republic from transferring any of the estate's assets; the Ninth Circuit set aside that ruling as inconsistent with the Republic's sovereign immunity. *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 548 (9th Cir. 1996). Judge Real then ordered two Swiss banks to transfer to the registry of the Hawaii district court assets that had been frozen by the Swiss government, and to commence an interpleader action in Hawaii to settle ownership of those assets; after the Swiss government protested and the United States filed as an *amicus* to challenge the validity of the order, the Ninth Circuit reversed, holding that there was no authority for the district court's ruling. *Hilao* v. *Estate of Marcos*, 95 F.3d 848, 853-54 (9th Cir. 1996). Following Judge Real's further refusal to dismiss an action brought by the Pimentel class seeking to enjoin the Swiss banks from transferring the assets ex-

[4] Judge Real had first ruled against the Republic and the PCGG on the merits. The Ninth Circuit set aside that judgment, holding that the Republic and the PCGG had sovereign immunity and that entitlement to immunity had to be resolved prior to any consideration of the merits. No. 06-1204, Pet. App. 30a-42a.

cept at the direction of the Hawaii district court, the Ninth Circuit ruled that the suit had to be dismissed on act-of-state grounds. *Credit Suisse* v. *United States District Court*, 130 F.3d 1342, 1347-48 (9th Cir. 1997). And after Judge Real threatened to hold PNB in contempt for complying with an order of the Philippine Supreme Court regarding disposition of certain Marcos-related assets, the Ninth Circuit again reversed under the act-of-state doctrine. *In re Philippine National Bank*, 397 F.3d 768, 772-75 (9th Cir. 2005).

In the proceeding now before the Court, however, the Ninth Circuit affirmed the district court's award of the Arelma assets to the Pimentel class. As the Republic and PNB explain in more detail in their pending petition (at 7-10), the Ninth Circuit rejected the argument that the Republic and the PCGG – which have asserted their sovereign immunity and therefore did not participate in the district court proceedings – are indispensable parties under Fed. R. Civ. P. 19(b), in whose absence the action may not proceed. The court of appeals reasoned that the sovereign immunity of the Republic and the PCGG did not require dismissal of the action because, in the court's view, they would not prevail on the merits if they litigated their entitlement to the Arelma assets. No. 06-1204, Pet. App. 7a-8a. The court also believed that Rule 19(b) directs judges to "achieve fairness." *Id.* at 6a. In trying to advance the equities here, the court placed considerable weight on "the symbolic significance of some tangible recovery" for the Pimentel class (*id.* at 9a), criticizing the Philippine government for not taking what the court regarded as adequate "steps to compensate those persons who suffered outrage from the extra-legal acts of a man who was President of the Republic." *Id.* at 9a-10a.

As for Roxas, the Ninth Circuit in its initial decision stated:

> Roxas was a victim, too. His injury was suffered before the date used to determine the class. He, too, has a judgment against Marcos, which resulted in an award of

> damages that has been affirmed on appeal. *Roxas v. Marcos*, 109 Hawai'i 83 (2005) (unpublished). Should he, an early victim of Marcos, recover more in this action than the victims comprising the class? Roxas's claim that [his] assets could be traced to the Merrill Lynch account was not accepted by the district court. But if it were accepted, we believe that equity could assign him no more than the pro rata share due any class member; it is fair to treat him as entitled to this much and no more.

No. 06-1204, Pet. App. 27a-28a.

On rehearing, the panel modified its opinion regarding Roxas. Upholding the district court's exclusion of evidence bearing on Roxas's claim that the assets used to fund Arelma had been stolen from him (No. 06-1204, Pet. App. 10a-11a), the Ninth Circuit "agree[d] with the district court that the record does not support a finding that the Arelma assets were stolen from him." *Id.* at 11a. The court of appeals added that Roxas's tort judgment "is against Imelda Marcos personally" and "does not bind the Marcos estate." *Ibid.* Without explanation, the court omitted the language from its prior opinion suggesting that, if the Arelma account could be traced to Roxas's assets, Roxas nevertheless would be entitled to recover no more than an individual member of the Pimentel class.

REASONS FOR DENYING THE PETITION

The Roxas petition should be denied. In rejecting Roxas's challenge to the district court's decision, the Ninth Circuit held only that his claim regarding the origin of the Arelma assets was unsupported by the record, that he does not have a judgment against the Marcos estate, and that he accordingly "has no claim to be satisfied here." No. 06-1204, Pet. App. 11a. The court of appeals simply did not expressly address Roxas's remaining arguments, which he now raises in his petition for certiorari. There accordingly is no clear

holding by the Ninth Circuit that conflicts with decisions of other courts of appeals or of this Court. That makes further review inappropriate.[5]

In two respects, however, the proceedings relating to Roxas confirm that the Court should *grant* the pending petition for certiorari filed by the Republic, the PCGG, PNB, and Arelma. *First*, the Ninth Circuit's treatment of the Roxas claim highlights that court's willingness to disregard procedural rules in the interest of advancing a purely subjective and legally unconstrained concept of "fairness." In its haste to rule for the Pimentel class, the court of appeals wholly ignored virtually all of the legal contentions advanced by Roxas in his appeal. The court's initial opinion, moreover, held that, if Roxas's factual claims were correct, he nevertheless would be entitled to recover no more than any individual member of the Pimentel class – even though Roxas is *not* a member of that class and his claim rests, not on tort injury inflicted by Marcos (as does the Pimentel class claim), but on the assertion that *all* of the assets at issue were stolen from him. The court offered no support at all for this bizarre holding. The Ninth Circuit was similarly cavalier in its rejection of the more substantial arguments advanced by the Republic and PNB, wholly ignoring both the legal constraints set by Rule 19(b) and sovereign immunity principles in a rough attempt to implement its seat-of-the-pants concept of fairness. See No. 06-1204, Pet. 13-30.

Second, and more fundamentally, the Roxas claim illustrates the importance of allowing the Philippine courts to resolve disputes about ownership of Marcos-related assets. The parties to this proceeding all agree that the Arelma assets

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[5] Of course, if the Court grants the petition filed by the Republic and PNB and sets aside the Ninth Circuit's decision on the ground that the Republic and the PCGG are indispensable parties, Roxas will be free to litigate his claim to the Arelma assets in the Philippine courts.

were stolen by Marcos *in the Philippines* while he was serving as President of the Republic. The injuries caused by Marcos for which the claimants in this proceeding seek recovery all were inflicted *in the Philippines*. The individual claimants are virtually all citizens *of the Philippines*. And the Republic is seeking the recovery of assets that were stolen from, and at all times have belonged to, *the people of the Philippines*.

Moreover, the claims of the Republic are legally precedent to those of other claimants to the Arelma assets: under Philippine law, assets misappropriated by Marcos while he was serving as President have at all times been owned by the Republic and never entered the Marcos estate. See No. 06-1204, Pet. 2. As a consequence, plaintiffs who assert claims to particular assets as creditors of the Marcos estate (like the Pimentel class) must await a determination that those assets in fact belong to the estate. So far as the Arelma assets are concerned, that question will be settled by litigation that is currently pending in the Philippine courts. This Court accordingly should grant the petition of the Republic and PNB to set aside the Ninth Circuit's decision, which effectively pretermits long-running Philippine litigation between the Republic and the estate of its former President.

CONCLUSION

The Court should deny the Roxas petition and grant the petition in No. 06-1204, *Republic of the Philippines* v. *Pimentel*.

Respectfully submitted.

STEPHEN V. BOMSE
Counsel of Record
RACHEL M. JONES
ADAM J. GROMFIN
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

Counsel for Respondents Republic of the Philippines and Philippine Presidential Commission on Good Government

KENNETH S. GELLER
CHARLES A. ROTHFELD
DAVID M. GOSSETT
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents Philippine National Bank and Arelma Inc.

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Petitioners,

v.

MARIANO J. PIMENTEL,

Respondent.

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

ROBERT A. SWIFT*
ALLAN M. HOFFMAN
KOHN, SWIFT, & GRAF, P.C.
One South Broad Street,
Suite 2100
Philadelphia, PA 19107
(215) 238-1700

JON M. VAN DYKE
2515 Dole Street
Honolulu, HI 96822
(808) 956-8509

SHERRY P. BRODER
841 Bishop Street, Suite 800
Honolulu, HI 96813
(808) 531-8411

Counsel for Respondent Mariano J. Pimentel
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the lower courts followed the test set out in Rule 19(b) of the Federal Rules of Civil Procedure and in *Provident Tradesmens Bank & Trust Co. v. Patterson* in concluding that the Republic of the Philippines and its PCGG were not indispensable parties to this interpleader litigation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Two petitions for writ of certiorari were filed in this matter, No. 06-1039 and No. 06-1204. Respondents to both petitions are Mariano J. Pimentel and a Class of 9,539 Filipino Human Rights Victims. Petitioners are Republic of the Philippines, Philippine Presidential Commission on Good Government, Philippine National Bank, and Arelma, Inc. (No. 06-1204), and The Estate of Roger Roxas and the Golden Budha Corporation (No. 06-1039). Petition No. 06-1204 identifies The Estate of Roger Roxas and the Golden Budha Corporation as additional Respondents.

Petitioner, Republic of the Philippines ("Republic"), owns 16% of the outstanding stock of Petitioner, Philippine National Bank ("PNB"), and elects 4 of its 11 directors. Rogel Zenorosa Dep. at 9-12. The Republic is party to an escrow agreement with PNB whereby PNB acts on behalf of the Republic, at the Republic's expense and at the Republic's instructions regarding Arelma. *Id.* All the outstanding shares of Arelma, a Panamanian corporation, are currently held by PNB pursuant to the escrow agreement, and the directors of Arelma are elected either directly or indirectly by the Republic and its agency, the Presidential Commission on Good Government. *Id.* at 25-36.

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STATEMENT OF THE CASE

The judgment in this statutory interpleader action awarded approximately $35 million in an account at Merrill Lynch, Pierce, Fenner & Smith, Inc., to the Class of 9,539 victims of grave human rights abuses during the 1972-86 martial-law regime of Ferdinand E. Marcos in the Republic of the Philippines ("Republic"). The Class members were seeking to collect on their judgment of almost $2 billion rendered in an historic human rights action, *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996); ROP App. 49a, 53a.[1] The Class members, including heirs of victims, represented in this action by Mariano Pimentel, are those who were "subjected to hideous tortures," "summarily executed" or "simply disappeared." ROP App. 45a; *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1462-63 (D. Hi. 1995) (listing specific forms of torture used). They were victims of "massive *jus cogens* human rights abuses for which Marcos was responsible." ROP App. 53a. But for the filing of the petitions for certiorari in this Court, the Class members, most of whom live in poverty, would have already received a court-ordered first installment of $2,000 each from the assets at issue. Order of 6/27/2006 at 3 (Dkt. No. 409).

While Marcos was concealing and investing his own assets during martial law, he orchestrated and directed massive human rights abuses. ROP App. 53a. Marcos directly controlled all military and para-military groups in the Philippines. ROP App. 44a-45a. "By his Order, tens of thousands of persons were arrested and detained without charges and without the right of habeas corpus. Thousands were subjected to hideous tortures. Thousands more

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[1] Citations to the record, where relevant, are preceded by the abbreviation of each petitioner's name: ROP for the Republic and GBR for Golden Budha/Roxas. "Dkt. No." refers to the corresponding official docket entry numbers in the interpleader action filed in the District Court of Hawaii, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma Inc., et al.*, No. 00-595 (D. Hi. 2000).

were summarily executed and others simply 'disappeared.'" ROP App. 45a. As the District Court found:

> The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead.

ROP App. 48a.

Merrill Lynch brought this interpleader action on September 14, 2000[2] to determine the entitlement to Merrill Lynch securities account No. 165-07312 established by Ferdinand E. Marcos in 1972 in the name of Arelma Inc.

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[2] The Republic's assertion of "manufactured" jurisdiction is bogus. Pimentel and the Class of Human Rights Victims sued Merrill Lynch in federal court in Hawaii on September 6, 2000 regarding the assets in Arelma's securities trading account. Order of 3/22/2001 at 6 (Dkt. No. 56). Merrill Lynch then filed the present interpleader complaint on September 14, 2000 in the federal court in Hawaii as a result of an agreement reached with Pimentel's counsel to interplead the assets into that court in return for dismissal of the September 6 lawsuit without prejudice. Compl. for Interpleader (Dkt. No. 1). At a conference in the MDL action on September 11, 2000, the judge encouraged this solution in the presence of counsel for the Republic. Judges often urge such solutions. *See Texaco, Inc. v. Ponsoldt*, 118 F.3d 1367, 1368 (9th Cir. 1997) (as part of a settlement agreement the District Court urged the filing of an interpleader). Merrill Lynch sought the District Court's advice to avoid any issue of whether a transfer of the assets would violate the permanent injunction contained in the Class' 1995 Judgment. *See Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 762 (9th Cir. 1996) (affirming contempt citation for violating permanent injunction). A separate federal judge in Hawaii, ruling on the Republic's recusal motion, found "the court did not direct, order, or require Merrill Lynch to file the instant action" and noted that "[t]he Court concurred with Plaintiffs' Class that the action should be filed in the District of Hawaii." Dkt. No. 56 at 5-6.

("Arelma"), a sham corporation incorporated in Panama for the purpose of hiding actual ownership of these assets. ROP App. 46a-47a. The account was begun with $2,000,000 provided by Marcos, and in the intervening years grew to about $35,000,000. ROP App. 45a-46a. The assets were deposited in the U.S. District Court of Hawaii for the purpose of this litigation. ROP App. 46a.

The record in this case, developed through four years of protracted and contentious litigation, contains undisputed evidence that the Merrill Lynch account was established at the explicit direction of Marcos with funds he provided. "Arelma is a shell corporation" (ROP App. 10a); "[Ferdinand E.] Marcos controlled Arelma during his lifetime" (ROP App. 48a); "Arelma was incorporated to receive funds owned by Ferdinand Marcos" (ROP App. 48a); and, "[t]he source of those funds [in the Merrill Lynch account] was Ferdinand E. Marcos." ROP App. 45a. "The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos." ROP App. 53a.

As the District Court found, the Republic knew about the securities trading account at the Merrill Lynch account since at least 1986. In 1987 the Republic obtained an injunction from a federal court in New York freezing the account. ROP App. 47a; Order of 8/14/2003 (ROP App. 56a). Although the Republic filed a dozen or more lawsuits in courts throughout the United States seeking to recover various Marcos assets, it never filed a lawsuit to recover the Merrill Lynch account. ROP App. 58a. The Republic participated in at least one other interpleader proceeding in the United States involving a Picasso painting allegedly owned by Marcos. *Republic of the Philippines v. Christie's*, No. 98-3871 (S.D.N.Y. 1998). The Republic never asserted its sovereign immunity in any of those proceedings. *See, e.g.*, ROP App. 47a.

There was no evidence in discovery or at trial that supported the Republic's position that the monies were "misappropriated" or "stolen" as alleged in the Republic's

Petition. At no time has the Republic ever come forth with evidence that the money at issue belonged to it. Although the Republic did not participate directly in the interpleader after the Republic's dismissal from the litigation, it participated indirectly since (a) after 2000, it controlled Arelma, worked with Arelma's counsel, and paid for Arelma's prosecution of the litigation, and (b) it controlled the escrow agent, Philippine National Bank ("PNB"), owned 16% of PNB's stock, and elected 4 of its 11 directors. Rogel Zenarosa Dep. at 9-12. Neither Arelma nor PNB ever garnered evidence supporting the Republic's allegation that the Merrill Lynch account derived from the Republic's assets.[3] ROP App. 53a.

The Republic moved to dismiss itself on sovereign immunity grounds in this litigation only after losing a motion to recuse the judge assigned to the case. *See* Dkt. No. 56. After being dismissed as a party, the Republic, as a nonparty, persisted in delaying and staying the litigation by filing numerous motions, mandamuses and appeals.[4] The Republic's persistent refrain – that Philippine courts would soon rule on entitlement to the interpleaded assets – resulted in stays of proceedings totaling 17 months. One stay was terminated by the District Court when Pimentel conclusively showed the Court that there was no case pending in the Philippines seeking determination of the ownership of the Merrill Lynch account. ROP App. 56a-57a. Four days after entry of the July 12, 2004 judgment herein, the Republic filed new motions in the Philippines to reopen long closed litigation there to have a Philippine court countermand the District Court's award of the assets

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[3] The Republic's representation that the assets in the Arelma account were a "subset" (ROP Pet. at 4) of the two stock certificates controlled by Swiss authorities is legally and factually wrong. The Swiss government never had possession or control of the assets in the Merrill Lynch account. ROP App. 46a. As a legal matter, a stockholder does not own or control the assets of the corporation. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); ROP App. 52a.

[4] This Court held in *Karcher v. May*, 484 U.S. 72, 77 (1987), that a nonparty has no standing to appeal.

at issue to the Class of Filipino victims. After almost three years, the Philippine court still has not ruled on the motion.

In an earlier appeal, *In re Republic of the Philippines*, 309 F.3d 1143 (9th Cir. 2002), the Ninth Circuit agreed that the Republic was entitled to dismissal on sovereign immunity grounds, and even held the Republic was a necessary party pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. However, it declined to accept the Republic's argument that it was an indispensable party to this litigation pursuant to Rule 19(b). *Id.* at 1153. On remand, the District Court made detailed findings and conclusions holding the Republic was not an indispensable party. ROP App. 58a-60a. An interlocutory appeal on that issue was denied by the Ninth Circuit on February 20, 2004 (Dkt. No. 375), clearing the way for a trial.

At trial, Pimentel and the Class prevailed in proving that Arelma was an *alter ego* of Ferdinand Marcos and that their claim, based on their 1995 judgment against the Marcos Estate, had priority to the interpleaded assets. ROP App. 53a-54a. PNB's claim, based on ownership of the Arelma stock certificates, was denied based on this Court's decision in *Dole Food Co.*, 538 U.S. 468 (2003), that an individual shareholder does not own a corporation's assets. ROP App. 52a. The claims of the Roxas Estate and the Golden Budha Corporation were denied since (a) their prior judgments were not against Ferdinand Marcos or his Estate, and (b) they failed to prove the assets in the Merrill Lynch account derived from property stolen from them. ROP App. 53a-54a. The Roxas Estate and the Golden Budha Corporation took virtually no discovery during the litigation and attempted at trial to use deposition transcripts from a separate state court action in violation of FRE 804(b)(1), and expert testimony without complying with Rule 26(a)(2). ROP App. 10a-11a.

The Ninth Circuit affirmed the judgment in favor of Pimentel and the Class. ROP App. 11a. Addressing the issue of whether the Republic was an indispensable party, the Ninth Circuit engaged in a *de novo* balancing of the factors set forth in Rule 19(b). ROP App. 4a-10a. Balancing

those factors and applying equity and good conscience, as mandated by the Rule, the Ninth Circuit concluded the Republic was not an indispensable party. ROP App. 10a. The overriding consideration in that Court's opinion was that the Republic had no likelihood of recovering the assets since (a) its claim in the United States would be barred by the applicable statute of limitations and (b) a decision of a Philippine court would not be enforced in a United States court because of a prior decision by a United States court which possessed *in rem* jurisdiction over the interpleaded assets. ROP App. 8a-10a.

The Ninth Circuit rejected the arguments of the Roxas Estate and the Golden Budha Corporation finding the District Court had properly excluded proffered evidence for failure to comply with the Federal Rules of Procedure and the Federal Rules of Evidence. ROP App. 10a-11a. Their remaining arguments were deemed specious by the Ninth Circuit.

The Republic further protracted this litigation and a distribution of $2,000 to thousands of its citizens by filing two motions for reconsideration and *en banc* review. ROP App. 1a. Now, after failing to persuade any of the 27 jurists who have examined its position, the Republic has filed a petition for certiorari with this Honorable Court.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT CORRECTLY APPLIED WELL-SETTLED LAW IN REACHING THE DETERMINATION THAT THE REPUBLIC OF THE PHILIPPINES WAS NOT AN INDISPENSABLE PARTY UNDER RULE 19(b)

A. The Ninth Circuit Properly Engaged in a *de novo* Balancing Pursuant to Rule 19(b) and the *Provident Tradesmens Bank & Trust Co.* Decision

The courts below followed Rule 19(b) of the Federal Rules of Civil Procedure in determining whether the Republic of the Philippines was an indispensable party to the interpleader action:

> ***Rule 19(b). Determination by Court Whenever Joinder not Feasible.*** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment, rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). The language of this rule explicitly requires a court to makes its decision "in equity and good conscience" by balancing a series of factors in the context of the dispute needing resolution. *Id.*

In affirming the District Court's ruling, the Ninth Circuit followed this Honorable Court's decision in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109, 118 (1968),[5] which instructed courts to look through "the lens of 'equity and good conscience'" and thus to determine indispensability "'in the context of [this] particular litigation.'" *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 891 (9th Cir. 2006); ROP App. 4a-5a. This Court explained in *Provident Tradesmens Bank* that a decision on whether a party is "indispensable" "must be based on *factors varying with the different cases*, some such factors being substantive, some procedural, some compelling by themselves, and some

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[5] The Republic has acknowledged that Justice Harlan's opinion for a unanimous court in *Provident Tradesmens Bank* is the "leading decision on Rule 19(b)." ROP Pet. at 12.

subject to balancing against opposing interests." 390 U.S. at 118-19 (emphasis added). The *Provident Tradesmens Bank* decision notably explained that "[a]fter trial, considerations of efficiency" such as "the time and expense" involved in the trial militate in favor of denying a Rule 19(b) motion. *Id.* at 111. The Ninth Circuit quoted from *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), for the proposition that the "equity" called for in Rule 19(b) requires courts to exercise "flexibility . . . marked by 'mercy and practicality.'" ROP App. 6a.

The Ninth Circuit thus examined the "circumstances and practicalities of the Republic's claim" to determine whether the judgment rendered in its absence "'might be prejudicial to [it] or those already parties.'" ROP App. 4a (*quoting* Rule 19(b)). It then examined two specific scenarios that could follow if the Republic were deemed indispensable, and concluded that "it is doubtful that the Republic has any likelihood of recovering the Arelma assets" because "[t]he res is in the United States" and "[i]t cannot be finally disposed of except by the judgment of a court in the United States." ROP App. 7a-8a. This conclusion was reinforced by the Ninth Circuit's recognition that any effort by the Republic to pursue the Arelma assets in an action against Merrill Lynch in New York would be barred by New York's six-year statute of limitations. ROP App. 8a (*citing* N.Y. C.P.L.R. § 213, and also *citing Provident Tradesmens Bank*, 390 U.S. at 115, for the proposition that the Republic's "failure to secure a judgment affecting these assets is a factor to be taken into account"). The Ninth Circuit explained that any judgment the Republic might obtain in the Philippines would be unenforceable, because the Philippine court would have no jurisdiction over the *res* – the Arelma assets – and if a Philippine court were to issue a ruling regarding these assets "a court of this country would not be bound to give it effect." ROP App. 8a.[6] *See also Merrill Lynch, Pierce,*

[6] The conclusion that only a U.S. court can adjudicate claims to assets held in the United States flows from the most basic principles of

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Fenner and Smith, Inc. v. ENC Corp., 467 F.3d 1205, 1207 (9th Cir. 2006), where the Ninth Circuit noted that the Philippine Supreme Court had previously "categorically declared" that its forfeiture proceeding regarding Marcos assets "is *in rem*," citing *Republic of the Phil. v. Hon. Sandiganbayan*, G.R. No. 152154 (Phil. Nov. 18, 2003) and RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 482(2)(a) (1987) for the proposition that "any judgment made without proper jurisdiction is unenforceable in the United States."[7] The Ninth Circuit

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due process recognized in all legal systems. As a prominent Philippine writer has explained, Philippine law agrees with these concepts of due process:

> . . . authority to hear and decide cases may be based on a number of factors: the presence, submission, or appearance of the parties or one of them; the doing of certain acts within the State; *the fact that the property involved in the litigation is in the forum*; or the fact that the parties are either citizens or residents of the State. *In the absence of such minimum contacts, a judgment rendered by the court of one State may be refused recognition by other States.*

JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 38 (1979, reprinted 1981) (emphasis added). *See also id.* at 40 (explaining that in an *in rem* action "the State may render through its courts a valid judgment, as long as it has jurisdiction over the thing even though it may not have personal jurisdiction over the persons whose interests are affected"), and at 41-47 (explaining that Philippine jurisdictional principles have evolved from the concepts laid down in *Pennoyer v. Neff*, 95 U.S. 714 (1877), and its progeny).

[7] The Republic's Petition acknowledges that the Philippine Supreme Court has previously declined to render any ruling regarding the Arelma assets (ROP Pet. at 4), but nonetheless contends that this matter "is now pending before the Sandiganbayan and will be resolved by that court or the Philippine Supreme Court." ROP Pet. at 5. The Philippine courts surely understand, however, that they do not have jurisdiction to render a ruling regarding the Arelma assets, and they are unlikely to issue a ruling that would so flagrantly violate recognized standards of due process and jurisdiction.

The District Court explicitly found as a factual matter that the Republic made no claim for relief regarding the Arelma assets in the 1991 petition filed by the Republic that led to the 2003 decision of the Philippine Supreme Court: "There is no claim in that lawsuit seeking forfeiture of the assets in the Arelma account at Merrill Lynch." ROP

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also noted that the Republic is not bound by the present proceeding, "because it is not a party to the action," and that it is not formally prejudiced, because it remains free to pursue a claim against Merrill Lynch in the United States (although its odds of success are extremely low because of New York's six-year statute of limitations). ROP App. 8a-9a.

The Ninth Circuit completed the balancing process required by Rule 19(b) by concluding that "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it" (ROP App. 9a); that although the Arelma assets are not adequate to satisfy the Human Rights Victims $2 billion award, nonetheless "the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them" (ROP App. 9a); that if this interpleader were to have been dismissed on the basis of indispensability, the Human Rights Victims would have no forum open to them in the Philippines[8] (ROP App. 9a); and that they could sue in New

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App. 56a. The Republic's failure to claim these assets likely resulted from its recognition that no Philippine court could exercise jurisdiction over assets that were in the custody of the United States District Court for the District of Hawaii.

[8] The existence of an adequate alternative remedy for the litigants if an action were to be dismissed is "[p]erhaps the factor most important to a court in determining whether to proceed or dismiss, in the absence of a person who should be joined but cannot be made a party." Jean F. Rydstrom, *Validity, Construction, and Application of Rule 19(b) of Federal Rules of Civil Procedure, as Amended in 1966, Providing for Determination to Be Made by Court to Proceed with or Dismiss Action When Joinder of Person Needed for Just Adjudication Is Not Feasible*, 21 A.L.R. Fed. 12 (1974) § 12(a). The Human Rights Victims are barred from the forfeiture litigation in the Philippines. The District Court specifically found that other parties have no standing to participate in Philippine court forfeiture proceedings between the Republic and the Marcoses (ROP App. 59a), and the Republic has acknowledged this. ROP Pet. at 24 n.10. Due process and equity require that an alternative forum be one in which all parties can participate, not one where just two parties decide how to slice up the money to the exclusion of other claimants.

York but that would impose "a needless repetition that will not benefit the Republic." ROP App. 9a. The Ninth Circuit noted that it would be unrealistic to direct the Human Rights Victims to "find redress from their own government" because – despite the passage of 21 years since Marcos was forced out of office – "the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic." ROP App. 9a-10a. The Ninth Circuit then concluded that "[n]o injustice is done [to the Republic] if it now loses what it can never effectually possess." ROP App. 9a.

B. Foreign Sovereigns Are Not Entitled to Privileged Status Under Rule 19

The Republic's contention that an assertion of sovereign immunity requires a finding of indispensability is not supported by case law. ROP Pet. at 13. In fact, *the Republic does not cite to a single instance in which a case was dismissed on the basis of a foreign government's assertion of both sovereign immunity and indispensability.*

Numerous cases can be cited where litigation has continued despite assertions of immunity by sovereign parties, including, *e.g.*, *Saratoga County Chamber of Commerce, Inc. v. Pataki,* 100 N.Y.2d 801, 798 N.E.2d 1047, 1058 (N.Y. 2003) (ruling that although a tribe protected by sovereign immunity had interests that would be affected by the litigation, the tribe should not be deemed an indispensable party because that would leave the public with no effective remedy against constitutional violations and other abuses by the executive branch),[9] and *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1118-20 (E.D. Cal. 2002), *aff'd on other grounds*, 353 F.3d 712 (9th

[9] The court explained: "While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court." *Id.* at 1058-59.

Cir. 2003) (ruling that although the immune tribes "can claim a legal interest in this lawsuit," the claim could proceed without them because their interest would be represented by another party). This Court explained in *Provident Tradesmens Bank* why the "deemed conclusive of indispensability" approach advocated by the Republic is misguided, explaining that a court does not know whether a particular party is indispensable until it has examined the situation to determine whether it can proceed without the party: "a court does not know whether a particular person is 'indispensable' until it had examined the situation to determine whether it can proceed without him." 390 U.S. at 119.[10]

The cases involving the immunity of the United States, the 50 states, and Indian tribes cited by the Republic are not analogous to the present situation, because Indian tribes, the 50 states, and the federal government operate within the jurisdiction of the United States and, if a case is dismissed after an assertion of sovereign immunity, other means exist to address and resolve the dispute. In *Dawavendewa v. Salt River Project Agric. Improvement*

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[10] A fact situation somewhat analogous to the present matter is found in *Lord Day & Lord v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549 (S.D.N.Y. 2001), which illustrates the pragmatic approach that courts have taken in interpleader actions. The plaintiff law firm brought an interpleader action to determine the proper recipient of settlement funds that had previously been transferred to the firm from the Panama Canal Company after a 1971 collision in the Panama Canal led to the loss of a cargo of rice. The plaintiff law firm named the Socialist Republic of Vietnam along with three foreign corporations as defendant-claimants in the interpleader action. Vietnam asserted its rights to funds, but also asserted its right to immunity as a foreign sovereign under the Foreign Sovereign Immunities Act. *Id.* at 555-56. The court rejected Vietnam's claim of immunity, under the counterclaim and waiver exceptions to sovereign immunity, but also went on to explain that because the court had *in rem* jurisdiction, it would have proceeded with the interpleader, even in Vietnam's absence, and would have been "enabled to determine title under 28 U.S.C. § 1655 and would necessarily award the funds to the Reinsurers, the only parties appearing." *Id.* at 558. This court also ruled that "there is no political question raised in addressing the conflict between the parties." *Id.* at 568.

and Power Dist., 276 F.3d 1150, 1162-63 (9th Cir. 2002), which the Republic cites, the court dismissed the claim only after determining that three potential "viable alternative forum[s]" existed – a suit on behalf of the plaintiff brought by the United States, a suit brought on behalf of the plaintiff by the Equal Employment Opportunity Commission, and a suit by the plaintiff in tribal court. (As explained in Section D below, courts have frequently ruled against an indispensability claim in cases involving claims of immunity by the United States, the 50 states, and Indian tribes, and such evaluations are always fact-specific.) *Id.*

When the litigant is a foreign government outside the jurisdiction of U.S. courts, however, such alternative means to address and resolve the dispute do not exist, and a dismissal of the claim would leave the dispute unresolved. Thus, the fourth Rule 19(b) factor – "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder" – becomes crucial. The Human Rights Victims would not have had an adequate remedy if the present interpleader action had been dismissed, and, hence, the lower courts ruled correctly in deciding that the Rule 19(b) factors, taken together, required a conclusion that the Republic was not an indispensable party and that the interpleader should not be dismissed.

The approach sought by the Republic would permit any miscreant foreign sovereign to claim an interest – with little or no evidentiary basis – in a particular litigation in the United States but successively assert sovereign immunity and indispensability to preclude adjudication. In this case, such an approach would further require a federal court with *in rem* jurisdiction over specific assets to abdicate jurisdiction to a foreign court. Such an approach would be inconsistent with the commitment to the rule of law approved by this Honorable Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 732 (2004) (indicating approval of the approach and analysis found in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994)).

C. Evaluating the Claim of the Party Seeking "Indispensability" Status Is Necessarily a Part of the Rule 19(b) Balancing Process

The Republic contends that the Ninth Circuit erred in "assessing the strength of the sovereign's claim in the sovereign's absence and making the outcome turn on whether, in the court's view, the sovereign is entitled to prevail on the merits." ROP Pet. at 17. The Ninth Circuit did not, however, inquire into the merits of the Republic's asserted claim, but instead assumed the validity of the claim and determined that even if it is valid it could not be invoked by the Republic to gain the interpleaded assets because the Republic was barred by the statute of limitations from pursuing this claim. ROP App. 8a. The District Court made the factual finding that the Republic was aware of the Arelma account established at Merrill Lynch since 1986: "The Republic has been aware of the deposit since 1986 when the government of Corazon Aquino was installed," and even had a U.S. court freeze the account at Merrill Lynch in 1987.[11] ROP App. 47a, 56a. At pages 3-4 of its petition, the Republic acknowledges that it was aware of the Arelma assets, but has taken no steps to recover them in the United States, even though it has filed more than a dozen lawsuits regarding other Marcos assets in this country. ROP Pet. at 3-4.

Rule 19(b), the predicate for dismissal, asks whether a necessary party's claim would be "impaired" if the dispute is adjudicated without the "necessary" party. This Court has made it clear that lower courts must evaluate the status of the claim presented by a party as part of its Rule 19(b) balancing process:

To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter the wrong way around: a court does

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[11] Obviously, the Republic made no assertion of sovereign immunity when it requested a U.S. Court to freeze the Arelma account at Merrill Lynch. *See* ROP App. 47a.

not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

Provident Tradesmens Bank, 390 U.S. at 119. This Court has emphasized that no "litmus test" formula can be applied to the variety of situations controlled by Rule 19(b), and that no test or "generalization" can serve as "a substitute for the analysis required by that Rule." *Id.* at 124.

In order for a party's claim to be "impaired," it must be shown that a "necessary" party has a "legally protectible claim," not merely a potential claim. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002) (finding that the Indian tribe had a "substantial" interest that "arises from terms in bargained contracts"); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

The expiration of the statute of limitations on the Republic's misappropriation claim is a valid basis for concluding the Republic is not an indispensable party. *See Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1408 (11th Cir. 1998) (" . . . the provisions for joinder of parties under Rules 19 and 21 are not immune from statutes of limitations."); *Young v. United Steelworkers of America*, 49 F.R.D. 74, 75-76 (E.D. Pa. 1969) (allowing a claim to proceed without a potential defendant who could not be sued because the statute of limitations had run against this defendant, noting that dismissal would leave plaintiff "with *no* remedy, let alone an *adequate* remedy" (emphasis in original) and that no potential prejudice against the absent party had been identified). *See also, Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 86 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

The Ninth Circuit could also have found that the Republic had an adequate alternate remedy. The Republic could pursue its forfeiture claim on the Merrill Lynch account against the Marcoses in the Philippines and, if successful, satisfy its money judgment by execution on the large number of valuable Marcos real properties in the Philippines which have been sequestered by the government for the past 20 years. Pls.' Reply Mem. at 6 (Dkt. No. 312).

D. Many Courts Have Allowed Actions to Proceed Even in the Absence of an Important Party If Equity and Justice So Require

Many courts, in many circumstances, have allowed civil actions to proceed even when important parties are missing. Indeed, it has been noted numerous times that "[i]n general, 'the philosophy of present Rule 19 is to avoid dismissal wherever possible.'" *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F. Supp. 798, 813 n.5 (D.R.I. 1976) (*quoting Heath v. Aspen Skiing Corp.*, 325 F. Supp. 223, 229 (D. Colo. 1971)). This Court has explained that "[a] court of equity will strain hard" to avoid dismissal. *Bourdieu v. Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

Many of the cases raising Rule 19(b) issues involve claims brought by Indian tribes, where the United States Government is the missing party, because its sovereign immunity protects it from being brought into the lawsuit against its will. Many courts have allowed such claims to proceed without the United States, and the courts have been particularly influenced by the potential consequence of a contrary ruling – *i.e.*, that the lawsuit could not be pursued, and thus, that the underlying dispute would continue to fester.

In *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999), the Tenth Circuit, reversing the dismissal of a case involving an Indian tribe, held that tribal sovereign immunity did not necessarily make the Tribe indispensable. That court stated that sovereign immunity does "not abrogate the application of Rule 19(b), whose factors this court has applied to Indian tribes in several cases. (citations omitted.)" *Id.* at 960. Years earlier in *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952), the Tenth Circuit noted that "[m]ore than twenty years have elapsed and the United States has failed to bring an action, in behalf of the Nations," and that "[i]f we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and

recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago." *Id.* Even though proceeding with the suit might well require the defendants to undertake "the burden and expense of defending two lawsuits" (*i.e.,* a second one brought by the United States), the court ruled that "the equities presented by the situation and the inconveniences that will result . . . weigh heavily in favor of the Nations." *Id.* Similarly, in *Narragansett Tribe of Indians, supra*, the court allowed an action brought by the tribe against the State of Rhode Island and other defendants to proceed even in the absence of the United States, which could not be sued because of its sovereign immunity. The court concluded that because the "likely consequence that a finding of indispensability herein would effectively deny plaintiff any remedy," it would be improper to find that the United States was an indispensable party and thus exclude the tribe from trying to vindicate its rights. *Id.* at 812-13.

These Indian cases rest to some extent "on the unique protection to be accorded Indian wards," *id.* at 813 (D.R.I. 1976), but it should be noted that Human Rights Victims are also subjects of unique protection under international law because of their well-established right to obtain compensation for their suffering.[12] Indeed, enabling victims of *jus*

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[12] As the Swiss Federal Supreme Court recognized in its 1997-98 decisions transferring Marcos assets to an escrow account controlled by PNB, the duty of a successor government to provide compensation to those whose human rights have been abused by a previous government is firmly established in international law. *In re Federal Office of Police Matters*, No. 1A.87/1997 (Switz. Sup. Ct. Dec. 10, 1997) at 36-39; *see also,* Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(3)(a), 999 U.N.T.S. 171 (which has been ratified by more than 140 countries including the Philippines and the United States) which says that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. . . ."; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 14, 23 I.L.M.

(Continued on following page)

cogens violations of fundamental human rights to receive compensation for their suffering and loss, as required by international law, could well be characterized as serving a public good and falling within the "public rights" exception to the indispensable party requirements. *See Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (weighing the claim of indispensability in light of the "public rights" exception and the fact that the interests of the parties claiming to be indispensable had been protected by other parties in the litigation).

Courts have refrained from dismissing actions even when important parties are missing in many non-Indian cases. In *Imperial Appliance Corp. v. Hamilton Mfg. Co.*, 263 F. Supp. 1015 (E.D. Wis. 1967), for instance, the court allowed the action to proceed after determining that joinder was not feasible because there was no alternative forum in which plaintiffs could maintain the action against all interested parties. Among the many other cases that have held similarly include *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1384 (10th Cir. 1997) (ruling that the United States was not an indispensable party after engaging in a weighing process and emphasizing that "the interests of judicial efficiency counsel strongly against dismissing this action at this point"); *Wyandotte Nation v. City of Kansas City, Kansas*, 200 F. Supp. 2d 1279, 1297-98 (D. Kan. 2002) (ruling that the United States was not an indispensable party after weighing relevant factors, and emphasizing the lack of an

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1027 (1984), *modified*, 24 I.L.M. 535 (1985), stating that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation"; *see also, e.g., The Velasquez Rodriguez Case*, 4 Inter-Am. C.H.R. (ser. C) (1988), *reprinted in* 28 I.L.M. 291 (1989) (holding that the American Convention on Human Rights imposes on each state party a "legal duty to . . . ensure the victim adequate compensation"). The Republic's violation of its obligations under international law to provide remedies to human rights victims must be part of the equation guiding this Honorable Court as it weighs the factors governing applicability of Rule 19(b) of the Federal Rules of Civil Procedure.

alternative remedy for the plaintiff); *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001) (holding that the tribe was not an indispensable party); *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001) (same); *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249 (8th Cir. 1998) (same); *Dairyland Greyhound Park, Inc. v. McCallum*, 258 Wis.2d 210, 655 N.W.2d 474 (Wis. 2002) (same).

II. THE NINTH CIRCUIT'S RULING DOES NOT UNDERCUT ANY OF THE REASONS UNDERLYING THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

The Republic presents a "parade of horribles" argument – contending that relations between the United States and the Philippines will deteriorate and that Philippine courts will be reluctant to enforce U.S. court orders if this Honorable Court does not reverse the decision below. ROP Pet. at 11, 25-30. As this Court explained in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), however, Congress enacted the Foreign Sovereign Immunities Act in 1976 for the purpose of taking the determination of immunity out of the realm of politics and establishing a "comprehensive" "'set of legal standards'" that "'codifies . . . the restrictive theory of sovereign immunity'" and "transfers the primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Id.* at 691 (*quoting Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983)). This statute was passed for the purpose of "clarifying the rules that judges should apply in resolving sovereign immunity claims *and eliminating political participation in the resolution of such claims*." *Id.* at 699 (emphasis added).

The determination of immunity, and the implementation of such a decision in conjunction with other applicable judicial principles, is thus the responsibility of the judiciary, and the judiciary has fulfilled its responsibility carefully and appropriately in this situation. The U.S. courts have expended substantial resources to the important

claims presented by the Filipino Human Rights Victims during the past 21 years of litigation, including numerous appeals to the Ninth Circuit and applications for certiorari to this Honorable Court during that period.

Earlier in the human rights litigation, the Philippine government submitted an *amicus curiae* brief urging that the "U.S. courts should adjudicate the Human Rights Victims' claim against Marcos" and stating clearly that "foreign relations with the United States will *not* be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1472 (*quoting* the Republic's *amicus curiae* brief; emphasis in the original brief). The U.S. courts acted in conformity with that request, and, after contentious adjudication, the decision below provides the opportunity to provide modest compensation to the Victims who have suffered so much, and their heirs. This distribution will vindicate transcendent values shared by the United States and the Philippines and, indeed, the entire world community. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 732 (2004) (indicating approval of the approach and analysis found in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467); and *id.* at 728 (recognizing that the Torture Victim Protections Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), has provided "authority that 'establish[es] and unambiguous and modern basis for' federal claims of torture and extrajudicial killing").

Belying the Republic's arguments and recent diplomatic note (ROP App. 65a) regarding the sensitivity of this case are hearings held by the U.S. Congress on March 14, 2007, investigating 295 "extrajudicial" killings in the Philippines, which the U.S. Department of State says are attributable to the Philippine military under the Arroyo administration. In an interview on March 11, 2007, the Philippines National Security Adviser, Norberto Gonzales, said "the inquiry was neither an affront to the country's sovereignty nor a breach of courtesy among nations." *See* "Palace Unfazed by US Hearing on Extrajudicial Killings,"

Philippine Daily Inquirer March 11, 2007, http://newsinfo.inquirer.net (and related articles on March 15 and 16). Surely a country unfazed by U.S. Congressional hearings tying its leadership to mass killings cannot be overly sensitive to a judicial interpleader proceeding determining entitlement to assets of a former president that have been in the United States since 1972. The U.S. Executive Branch has not intervened with its views on this litigation despite being solicited to do so by the Republic, and the Republic's request to have this Court formally seek that Branch's views comes much too late in this litigation and would be unproductive.

III. THE NINTH CIRCUIT'S RULING IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

The Republic does not cite one single decision from another circuit dismissing a claim involving a foreign government on the ground that the foreign government is both immune and indispensable. Disputes involving the United States government, the governments of the 50 states, and Indian tribes are different, because if a claim against one of those governments is dismissed, the matter can be resolved within the U.S. political system by other means. But, when a foreign government is involved, a dismissal would mean that the matter would escape resolution.

For 21 years this case has been before the U.S. courts, which carried forth the adjudication of the claims with the express approval of the Philippine government. *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d at 1472 (*quoting* the Republic's *amicus curiae* brief). Earlier decisions of the Ninth Circuit have been cited with approval by this Court. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731, 732 (2004) (indicating approval of the approach and analysis found in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467). The present decision was handled carefully by the Ninth Circuit, it is not inconsistent with the decisions of any other circuits,

and the fact-specific resolution of this matter presents no issue of national importance.

IV. THE NINTH CIRCUIT PROPERLY DENIED THE CLAIMS RAISED BY THE GOLDEN BUDHA AND ROXAS PETITIONERS

Other petitioners, the Estate of Roger Roxas and the Golden Budha Corporation (the "Golden Budha/Roxas petitioners"), primarily argue that the district court lacked jurisdiction or otherwise erred in distributing the assets to the Class for three independent reasons. The Ninth Circuit fully considered and correctly decided that the petitioners have no claim to the assets at issue (ROP App. 10a-11a).

A. The Probate Doctrine Does Not Bar Federal Jurisdiction to the Assets

The Golden Budha/Roxas petitioners first contend that the district court lacked jurisdiction to distribute the assets because the probate exception to federal jurisdiction reserves such action exclusively to state probate courts. GBR Pet. at 10-17. Indeed, for nine years, the Golden Budha/Roxas petitioners have argued to various courts that the probate exception applies to these proceedings and every court has rejected the argument.

Jurisdiction in this statutory interpleader action was not foreclosed by the probate exception, which prohibits federal courts from probating a will or administering an estate. *Markham v. Allen,* 326 U.S. 490, 494 (1946). This Court has ruled that the probate exception to federal jurisdiction is to be construed narrowly, recognizing that federal courts of equity have jurisdiction to entertain suits "'in favor of creditors, legatees, and heris' [sic] and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* at 494 (*quoting Waterman v.*

Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909)). Recently, this Court, in *Marshall v. Marshall*, 547 U.S. 293, 126 S. Ct. 1735 (2006), further clarified the narrow scope of the probate exception as articulated in *Markham*, explaining that "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. *But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.*" *Id.* at 1748 (emphasis added) (finding that "the instant case does not fall within the ambit of the narrow exception recognized by our decisions.")

Here, the probate exception does not apply to the Class claims for several reasons. First, the Class claims do not involve purely probate functions, such as the administration of an estate or the probate of a will. Second, the *res* at issue is *not* in the custody of another state or foreign court. In fact, no competing court in the United States or Philippines has ever sought to claim exclusive jurisdiction over the assets in the account. This is particularly compelling because even though Merrill Lynch specifically named Imelda Marcos and several Marcos family members as "defendants" in the interpleader action, none of those individuals ever appeared to claim the assets, and they thus suffered the entry of a default judgment in this matter. Nor did any of the Marcos family members take any subsequent action to have a probate court assert jurisdiction over the assets.

State courts have rejected opening a probate proceeding despite the zealous efforts of the Golden Budha/Roxas petitioners to do so. In *Matter of Estate of Marcos*, 88 Haw. 148, 963 P.2d 1124 (Haw. 1998), the Hawaii Supreme Court expressly rejected the multiple attempts by Irene L. Silverman and the Golden Budha/Roxas claimants to open probate proceedings for the Estate of Ferdinand E. Marcos in Hawai'i following Marcos's death on September 29,

1989.[13] The court highlighted the circuit [probate] court's finding that: "'[T]he property that is the subject of the inquiry in the present petition for reconsideration is not, though it may be in the territorial bounds of the State of Hawai[']i, is not in the Court's opinion, within the state because it is still being held by the United States government.'" 88 Haw. at 151, 963 P.2d at 1127.

Significantly, the Hawaii Supreme Court also examined the successful efforts of the Human Rights Victims to secure assets in proceedings in the District Court for the District of Hawaii such as the recovery of $1,000,000 for the house that Marcos resided in while in Hawaii and the sale at auction of his bullet proof Mercedes. *Id.* at 1128. The Hawaii Supreme Court found that "federal case law dictates that the circuit [probate] court does not have jurisdiction over property in the custody of the federal government." *Id.* at 1132. The Hawaii Supreme Court relied upon *United States v. $119,000 in U.S. Currency*, 793 F. Supp. 246, 250 (D. Hi. 1992), where the federal district court held that the circuit court could not exercise *in rem* jurisdiction over property that was in federal custody at the time of the circuit court proceeding.

> We agree with the federal district court and hold that property in the custody of the federal government is not subject to Hawai'i state courts' jurisdiction where the property was in custody at the time of the Hawai'i state court proceeding. Therefore, inasmuch as the property held by U.S. Customs was in federal custody at the time of all of the circuit court proceedings, it may not serve as the jurisdictional basis for a Hawai'i probate proceeding pursuant to HRS § 560:1-301(2).

88 Haw. at 156; 963 P.2d at 1132. Similarly, the assets at issue in Arelma are in the custody of the District Court for

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[13] Silverman and Golden Budha/Roxas also tried to open Marcos probate proceedings in California. The California Court of Appeal ruled there was no evidence that Marcos owned any property in California. *See Matter of Estate of Marcos*, 88 Haw. at 153, 963 P.2d at 1129.

the District of Hawaii, and the Hawaii Supreme Court has already made it very clear that the courts of Hawaii do not have any interest in such assets. Thus, the Hawaii Supreme Court ruled that the District Court for the District of Hawaii is the proper forum for the Class of Human Rights victims to pursue recovery of its judgment against Ferdinand Marcos and his Estate. Golden Budha/Roxas' assertion that a New York court could adjudicate this matter is also baseless. GBR Pet. at 15-16. No New York probate was ever opened nor was one attempted.

It is well established that once a federal court has entered judgment, it has ancillary jurisdiction over subsequent proceedings necessary to "vindicate its authority, and effectuate its decrees." *Peacock v. Thomas,* 516 U.S. 349, 354 (1996) (internal quotations omitted). This authority extends to proceedings to enforce the judgment. *See* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523, at 89 (2d ed. 1984) (Ancillary jurisdiction "include[s] those acts that the federal court must take in order properly to carry out its judgment on a matter as to which it has jurisdiction"). Without ancillary jurisdiction to enforce judgments, "the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." *Peacock,* 516 U.S. at 356 (internal quotations omitted). As a result of its entry of judgment for the Class of Human Rights Victims, the U.S. District Court for the District of Hawaii possessed ancillary jurisdiction to enforce the judgment through supplementary proceedings within federal jurisdiction.

Accordingly, the probate exception does not apply to the Class claims and the petition should be denied.

B. The Estate of Marcos Is Not an Indispensable Party To This Action

The Golden Budha/Roxas petitioners next argue that the lower court lacked federal jurisdiction over the assets because the Estate of Marcos is an indispensable party

that was absent from the proceedings. GBR Pet. at 17-18. This argument is baseless.[14]

As an initial matter, contrary to the contention of the Golden Budha/Roxas petitioners, the Estate was, in fact, named as a defendant in the interpleader action. Paragraph 5 of the Amended Complaint for Interpleader alleges that "[u]pon information and belief, Imelda R. Marcos and Ferdinand R. Marcos, Jr. are citizens of the Republic of the Philippines . . . are legal representatives of the Estate of Ferdinand E. Marcos (the "Estate"), and are beneficiaries of the Estate." Am. Compl. for Interpleader at 3 (Dkt. No. 102). Although named in the Amended Complaint and served, neither Imelda nor Ferdinand R. Marcos made an appearance in the proceedings and a default was entered against them. The default has never been contested. Thus, their failure to appear cannot be used as a sword to argue a lack of jurisdiction under Rule 19(b).

These jurisdictional issues are irrelevant as they apply to the Golden Budha/Roxas petitioners, which have failed to prove to any court that they have any direct claim to the assets at issue. The District Court denied their claim to the Arelma/Merrill Lynch assets on the grounds that the judgment that they based their claim upon was solely against Imelda Marcos, in her personal capacity, and not against the Estate of Ferdinand E. Marcos. ROP App. 53a-54a. Because the disputed assets were those of Ferdinand Marcos, and not Imelda, the District Judge ruled that the claim of the Golden Budha/Roxas claimants, "if any, is junior to the claim of the Filipino Judgment Creditors in MDL No. 840." ROP App. 49a. This ruling is clearly correct. Although they had the opportunity to do so, the Golden Budha/Roxas petitioners introduced no evidence that their assets were stolen by Ferdinand Marcos in 1971 or that the proceeds thereof are traceable to the

[14] In six years of the interpleader litigation, the Golden Budha/Roxas petitioners have never raised this argument previously, and should be precluded from raising it now, as the issue was not preserved below.

Arelma account at Merrill Lynch. Thus, because they failed to prove a direct claim to the assets at issue, they should be precluded from raising jurisdictional issues.

Furthermore, contrary to petitioners' contention, the Estate is not an indispensable party under Rule 19(b) of the Federal Rules of Civil Procedure. Applying the four factor test, it is clear that a judgment rendered in favor of the Class to recover all of the assets in the absence of the Estate caused minimal prejudice, if any, to the Estate and need not be lessened. Indeed, the non-prejudicial effect is evidenced by the non-action of the members of the Marcos Estate's personal representatives, who despite being named as defendants in the interpleader action, have taken no steps to claim the assets or to bring a probate action or to claim that the Estate is indispensable. *See Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 641 (3d Cir. 1998)) (finding that the U.S. was not indispensable and stating "the United States does not want to become a party to the suit, strongly suggesting that its interests will not be impeded if the suit goes forward without it."); *Sokaogon Chippewa Community v. State of Wisconsin, Oneida County*, 879 F.2d 300, 304 (7th Cir. 1989) (finding that the U.S. was not indispensable and stating that the U.S.'s failure to take any position as to its indispensability shows that "it must not fear the consequences of a judgment in this suit."). In fact, a default judgment was entered against them in this action and remains uncontested. Furthermore, petitioners' contention that the distribution of Estate assets in the absence of an estate is *per se* prejudicial is incorrect. GBR Pet. at 18. The judgment rendered in the absence of the Estate was certainly adequate and fair. Even more compelling is the fact that the Class claims could not be effectively litigated in another court. Accordingly, the Estate of Marcos is not an indispensable party and the petition should be denied.

C. The Claims of Pimentel and the Class of Human Rights Victims Were Cognizable in an Interpleader Action

The Golden Budha/Roxas petitioners' third jurisdictional argument contends that Pimentel and the Class of Human Rights Victims have no direct claim to the assets at issue because they are not adverse to a specific identified fund or party. GBR Pet. at 18-23. This argument also is meritless.[15]

The record is clear that Pimentel and the Class filed a timely action for these assets against Merrill Lynch and Arelma on September 6, 2000 asserting (1) that Arelma was the *alter ego* and instrumentality of Ferdinand E. Marcos and his Estate, their judgment debtor, and (2) demanding that the funds in Arelma's account at Merrill Lynch be paid over to Pimentel and the Class. *See Pimentel v. Merrill Lynch*, No. 00-580 (D. Hi. 2000); Dkt. No. 56 at 6. Pimentel and the Class reiterated this claim in their Amended Answer and Claim in Interpleader. Am. Answer and Claim in Interpleader at 4 (Dkt. No. 117). Pimentel and the Class withdrew the action after Merrill Lynch agreed to deposit the assets with the U.S. District Court for the District of Hawaii. Dkt. No. 56 at 5-6. These claims establish the requisite adversity between Pimentel and the Class, on one hand, and Merrill Lynch on the other hand.

For centuries the law has recognized that judgment debtors often try to evade payment of judgments by keeping their assets with a third party. The law is fashioned to

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[15] Neither in their Answers to the Amended Complaint (Dkt. No. 8), nor in the Joint Pretrial Memorandum (Dkt. No. 338), did Golden Budha/Roxas assert that Pimentel and the Class lacked sufficient adversity to Arelma and the fund. Moreover, Golden Budha/Roxas admitted in their Answer that there are conflicting claims to the ownership of the fund. *See* GBR Answer to Am. Compl. at 6 (Dkt. No. 113). The Golden Budha/Roxas petitioners improperly raised this issue for the first time in their appeal to the Ninth Circuit and here, again, even though the issue was not preserved below.

permit judgment creditors to pursue remedies against third parties so that just debts, like the one owing to the human rights victims, can be collected. The cases cited by Golden Budha/Roxas have no bearing on the facts of this case. For example, cases cited by the petitioners involve a plaintiff debtor that requires its general judgment creditor to collect on its judgment against a specific contested fund in an interpleader. *See, e.g., Airborne Freight Corp. v. United States*, 195 F.3d 238, 241-42 (5th Cir. 1999). This Court recognizes the standing of judgment creditors in interpleader actions. *See, e.g., United States v. McDermott*, 507 U.S. 447, 455 (1993). No case holds that a judgment creditor cannot be a proper claimant to an interpleaded fund where that fund can partially or fully satisfy the judgment.

D. The Ninth Circuit's Opinion Did Not Effectively Deny The Golden Budha/Roxas Petitioners' Right To Appeal

The Golden Budha/Roxas petitioners also contend that their right to appeal was denied when the Ninth Circuit failed to address their jurisdictional arguments in its written opinion, thereby purportedly depriving them "of a meaningful right of appeal." GBR Pet. at 23-27. The argument is disingenuous at best.

Even petitioners concede in their brief that the Ninth Circuit did not ignore their submissions. GBR Pet. at 24-26. Rather, in its opinion dated September, 12, 2006, the Ninth Circuit provided a well-reasoned basis for denying the claims of Roxas and Golden Budha, stating in pertinent part:

> The district court, however, found that Roxas had not proven that the assets in the Arelma account derived from any treasure stolen from him. Roxas contends that the district court erred in excluding expert testimony regarding the source of the funds and in excluding depositions of fact witnesses from his earlier action against Marcos.

> We do not believe that the district court abused its discretion in either ruling.
>
> * * *
>
> As the district court held, Roxas's tort judgment is against Imelda Marcos personally. It does not bind the Marcos estate. Roxas has no claim to be satisfied here.

ROP App. 10a-11a. Having disposed of the Golden Budha/Roxas petitioners' claims on the grounds that they had failed to prove a direct claim or even a factual basis to any of the assets, the Ninth Circuit was not obligated as a matter of law to address every argument that petitioners raised in their brief. *See, e.g., Alaska v. United States*, 545 U.S. 75, 91 (2005); *S.E.C. v. Sloan*, 436 U.S. 103, 109 n.2, 3 (1978). Accordingly, the petitioners' argument is without merit and does not warrant review.

CONCLUSION

The Ninth Circuit followed the law in ruling that the interpleaded assets should be distributed to the Class of Filipino Human Rights Victims in partial satisfaction of their judgment against the Estate of Ferdinand E. Marcos. Accordingly, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. SWIFT*
ALLAN M. HOFFMAN
KOHN, SWIFT, & GRAF, P.C.
One South Broad Street,
Suite 2100
Philadelphia, PA 19107
(215) 238-1700

JON M. VAN DYKE
2515 Dole Street
Honolulu, HI 96822
(808) 956-8509

SHERRY P. BRODER
841 Bishop Street, Suite 800
Honolulu, HI 96813
(808) 531-8411

Counsel for Respondent
**Counsel of Record*

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In The
Supreme Court of the United States

ESTATE OF ROGER ROXAS, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

ROBERT A. SWIFT*
KOHN, SWIFT, & GRAF, P.C.
One South Broad Street,
Suite 2100
Philadelphia, PA 19107
(215) 238-1700

JON M. VAN DYKE
2515 Dole Street
Honolulu, HI 96822
(808) 956-8509

SHERRY P. BRODER
841 Bishop Street, Suite 800
Honolulu, HI 96813
(808) 531-8411

Counsel for Respondent Mariano J. Pimentel
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUPPLEMENTAL BRIEF IN OPPOSITION

Respondent Mariano Pimentel and the Class of 9,539 Filipino human rights victims submit this Supplemental Opposition Brief pursuant to Supreme Court Rule 15.8 to respond to the Statement of Interest of the Solicitor General and to bring new authority to the attention of the Court. The Solicitor General opines that United States courts should abdicate jurisdiction over assets in the United States in virtually all cases when a foreign sovereign asserts a claim to those assets and also claims sovereign immunity. Because this position is (1) contrary to Rule 19(b) and (2) unsupported by any precedent in our jurisprudence, and because (3) the opinion of the court of appeals in this case followed directly the roadmap established by this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968), and is not contrary to the holdings of any other Circuit, this Court should deny certiorari.

REASONS FOR DENYING THE PETITION

I. THE DISCRETION COMMITTED TO THE LOWER COURTS BY RULE 19(b) IS NOT ABUSED SIMPLY BECAUSE THE SOLICITOR GENERAL'S ANALYSIS OF CERTAIN FACTORS DIFFERS FROM THE LOWER COURTS' THOUGHTFUL AND THOROUGH ANALYSIS

Rule 19(b) commits to the lower court's "equity and good conscience" the decision whether a party is

indispensable to the litigation. This is the broadest standard of discretion accorded a lower court by the Federal Rules of Civil Procedure. So long as the lower court considered the relevant criteria and balanced the equities – which occurred multiple times by 27 jurists during the history of this litigation – its decision should not be overturned by a reweighing of the equities. Indeed, the Solicitor General's undue emphasis on one party's foreign government status "exemplifies" the "inflexible approach" "that the Rule was designed to avoid." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107 (1968).

Read as a whole, the Solicitor General simply quarrels with the court of appeal's analysis of the Rule 19(b) criteria, and makes no claim that the court failed to consider and balance all factors. That the Solicitor General finds the extent of prejudice to the missing party greater, or places less emphasis on the lack of an alternative forum or prejudice to the Class, or discounts the impact to Merrill Lynch from dismissal of the interpleader, or speculates that a United States court might enforce a future foreign judgment contrary to an earlier domestic court judgment, or approves the meddling of a foreign sovereign in the work of the courts, provides no basis to overturn the lowers court's thoughtful and thorough analysis. Nor does it approach the heavier showing required after completion of trial to overturn a Rule 19(b) ruling:

> [The] interest in preserving a fully litigated judgment should be overborne only by rather

> greater opposing considerations than would be required at an earlier stage . . .

Provident Bank & Trust Co. v. Patterson, *supra*, 390 U.S. at 112. Rule 19(b)'s criteria are not exclusive and there are other factors the Solicitor General politely overlooks. The Solicitor General's analysis fails to mention: the Republic's lack of comity and its absence of respect for the United States courts it has heavily utilized to recover Marcos assets, the Republic's own responsibility for its strategic choice to assert sovereign immunity,[1] or the legal obligations the United States owes human rights victims to provide a forum for their claims pursuant to international treaties to which it is a party. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 14 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress

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[1] As the lower court found (ROP 58a-59a):

> The Republic and its PCGG made a strategic decision not to participate in this litigation even though they have participated in over a dozen lawsuits in the United States involving purported Marcos assets. "An absent party's opportunity to intervene may be considered in calculating the prejudicial effect to him." *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 820 n.5 (9th Cir. 1985). The Republic and PCGG must accept "the disadvantages as well as the advantages that flow from" their "strategic election." *Citibank International v. Collier Traino Inc.*, 809 F.2d 1438, 1441 (9th Cir. 1987).

and has an enforceable right to fair and adequate compensation . . . ").

II. THE SOLICITOR GENERAL'S APPROACH WOULD EMASCULATE THE ARTICLE III DUTY OF U.S. COURTS TO ADJUDICATE ENTITLEMENT TO ASSETS LONG HELD IN THE UNITED STATES

The Solicitor General urges that if a foreign sovereign claims assets located on American soil and also asserts sovereign immunity, United States courts must abdicate their constitutional duty to adjudicate title to the assets in virtually all cases and surrender their jurisdiction to a foreign court. In this case, the lower court held that it possessed *in rem* jurisdiction pursuant to 28 U.S.C. §1655 over the assets, in addition to interpleader jurisdiction.[2] ROP 50a. The lower court's assertion of *in rem* jurisdiction was not challenged on appeal or in this Court. This Court has never lowered the flag of American court jurisdiction over *in rem* actions. *See, e.g., Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (state sovereign immunity not a bar to bankruptcy jurisdiction since bankruptcy is similar to an *in rem* action). Applying the reasoning of *Katz*, interpleader

[2] The United States, at page 9 n.3 of its brief, incorrectly attempts to distinguish this case from other Supreme Court precedent on the ground there was *in rem* jurisdiction over the assets at issue in the other cases but not the instant case.

jurisdiction involves adjudication of entitlement to a *res* and a discharge decree.

The Rule 19(b) issue for which the Solicitor General advocates certiorari is *sui generis*. Never before has a foreign sovereign asserted its immunity to preclude, under Rule 19(b)'s indispensability criteria, a federal court from adjudicating entitlement to assets over which a United States court has both interpleader and *in rem* jurisdiction. Moreover, this action does not involve transitory assets located in the United States for a short time. The assets at issue have been on deposit in the United States for over three decades and in the custody of a federal court for seven years.

Although the Solicitor General asserts that the decision of the lower court conflicts with Rule 19(b) precedent in this Court and other circuits, it fails to cite a single case involving a foreign sovereign. The cases cited involve American political entities or Indian tribes, and in each case there were alternative methods of resolving the dispute within the United States. For example, in the case of Indian tribes, Congress could legislate a solution to the disputes. By contrast, there is no political or litigation alternative to the instant interpleader action.

The Solicitor General's position raises a more troubling issue. If a foreign sovereign can oust U.S. courts of Article III jurisdiction by simply claiming – without proof – assets located in the United States, this power could be asserted and abused by regimes hostile to the United States. Such a doctrine would

eviscerate the proper role of the courts to adjudicate disputes regarding assets in the United States.

III. THIS COURT SHOULD RESIST MANIPULATION OF COURT PROCEDURES BY FOREIGN GOVERNMENTS

Although the Republic of the Philippines has known of the existence of the Arelma account at Merrill Lynch since at least 1986 (when it had a federal court freeze the account), the Republic never sought judicial relief in the Philippines or in the United States as to that account until July 2004 – four days after judgment was rendered for Pimentel and the Class in the lower court. By seeking relief in a Philippine court, the Republic hoped to nullify the American judgment.[3] The Republic participated in the lower court proceedings in this case indirectly through other parties – Philippine National Bank and Arelma – both of which it controlled and paid legal fees for.[4] Those parties were proxies for the Republic,

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[3] The July 15, 2003 decision of the Philippine Supreme Court forfeiting the Swiss bank accounts made no mention of the Arelma funds on deposit with the United States court in Hawaii since the Republic never sought any relief as to those funds. *See* ROP 56a. The Republic's motion, pending in a lower Philippine court, seeks to reopen the Philippine Supreme Court decision which the latter Court had expressly declared final and executory.

[4] The Republic of the Philippines owns 16% of the outstanding stock of Philippine National Bank ("PNB") and elects 4 of its 11 directors. Zenorosa Dep. at 9-12. The Republic is party to an escrow agreement with PNB whereby PNB acts on behalf

(Continued on following page)

claimed the assets, and participated in every phase of the litigation. The inescapable conclusion is that when these parties lost in the lower court, nullification was the only alternative.

The Republic has utilized American courts extensively for the recovery of Marcos assets. Since 1986, it filed, or was party in, over a dozen legal proceedings involving alleged Marcos assets, including an interpleader proceeding. *See Republic of the Philippines v. Christie's*, No. 98-3871 (S.D.N.Y. 1998). It never once asserted its sovereign immunity. The assertion of sovereign immunity now is simply an attempt to manipulate this Court. Should the Republic eventually obtain a judgment of forfeiture as to the assets of Arelma in Philippine courts, it may fully satisfy that judgment from the substantial Marcos assets still under sequestration in the Philippines.

The Republic never sought the assistance of the United States under the Treaty on Mutual Legal Assistance in Criminal Matters ("MLAT"), Nov. 13, 1994, U.S.-Phil., S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1995) – and never mentioned the Treaty in lower court proceedings. Because private parties have no standing in a forfeiture proceeding in the Philippines, its citation now by the Solicitor General is a red herring. *See* ROP 41a. Thus, any forfeiture judgment obtained by the Republic as to the assets would

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of the Republic, at the Republic's expense and at the Republic's instructions regarding Arelma. *Id.*

not be eligible for recognition by a United States court under MLAT since Pimentel and the Class, with an interest in the assets, are barred from the proceeding. *See* 28 U.S.C. §2467(C); ROP 59a. Indeed, the Republic never sought to join Pimentel and the Class to the July 2004 forfeiture proceeding.

Indicative of the Republic's motives in this action is the recent decision by the United Nations Human Rights Committee ("HRC") finding that the Republic violated the rights of Pimentel and the Class under international law. *See Pimentel v. The Philippines*, No. 1320/2004 (Mar. 19, 2007).[5] The HRC found a violation of the United Nations Optional Protocol to the Covenant on Civil and Political Rights, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 14, 23 I.L.M. 1027 (1984), *modified*, 24 I.L.M. 535 (1985) by virtue of the Philippine court's dismissal of an action in Philippine courts to enforce the Class's 1995 United States judgment against the Marcos Estate for failure to pay a filing fee of $8.4 million, and the subsequent delay of 8 years and 3 months in overturning that decision.

> The Committee is of the view that the authors [the Class] are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective

[5] The decision was not communicated to counsel for Pimentel until after submission of Pimentel's initial Opposition Brief to this Court.

> remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the US judgment in the State party.

Id. at pp. 7-8.

The Republic's current position is diametrically opposite to its official position at the beginning of this human rights litigation, when the Republic represented to the court of appeals in an *amicus curiae* brief that the "U.S. courts should adjudicate the Human Rights Victims' claim against Marcos" and that "foreign relations with the United States will **not** be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1472 (9th Cir. 1994) (quoting from the Republic's *amicus curiae* brief; emphasis in the original brief).

The diplomatic note of the Swiss Federation which objected to the underlying judgment in favor of Pimentel and the Class is no less manipulative. Switzerland had *in rem* jurisdiction over the Arelma share certificates which it transferred to the Republic. The United States courts never interfered in any way with the share certificates or adjudicated entitlement to them. However, Switzerland never had control or jurisdiction over the assets in the Arelma account at Merrill Lynch which, since the account was opened in 1972, have been in the United States. Switzerland's assertion of jurisdiction over the Arelma

assets in the United States is nothing short of a frontal attack on this Court's decision in *Dole Food v. Patrickson*, 538 U.S. 468 (2003), which held that a stockholder does not own or control the assets of the corporation.

The Swiss Federation's position is contrary to the decisions of its own Supreme Court which permitted the return to the Philippines of Marcos funds located in Switzerland. *See In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.91/1997/odi, at A16 (Dec. 19, 1997) and *In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.101/1997/zus, at C19 (Jan. 7, 1998).[6] In these decisions, the Swiss Federal Court explicitly conditioned return of the funds on the Republic's compensation of Filipino human rights victims, referring explicitly to the judgment for the human rights victims in the case underlying the present attempt to enforce a judgment. As the court of appeals pointed out, the human rights victims have never been compensated. *See* ROP 9a-10a.

CONCLUSION

This Court should resist the manipulations of the Republic, whose objective is to preclude compensation to its own abused citizens despite a judgment

[6] These decisions were trial exhibits and reproduced in the appellate court record.

rendered in a United States court. The Ninth Circuit followed the dictates of Rule 19(b) and the roadmap laid down in *Provident Tradesmens Bank & Trust, supra,* in considering and balancing the equities as to whether the litigation should be dismissed for lack of a necessary party, paying due attention to the Republic's status as a foreign government entitled to immunity. Rule 19(b) demands no more and accords the court of appeal's decision great latitude.

Accordingly, the petitions for a writ of certiorari should be denied to enable the interpleaded assets to be distributed to the Class of Filipino Human Rights Victims in partial satisfaction of their judgment against the Estate of Ferdinand E. Marcos.

Respectfully submitted,

ROBERT A. SWIFT*
KOHN, SWIFT, & GRAF, P.C.
One South Broad Street,
Suite 2100
Philadelphia, PA 19107
(215) 238-1700

JON M. VAN DYKE
2515 Dole Street
Honolulu, HI 96822
(808) 956-8509

SHERRY P. BRODER
841 Bishop Street, Suite 800
Honolulu, HI 96813
(808) 531-8411

Counsel for Respondent Mariano J. Pimentel
**Counsel of Record*

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No. 06-1039 VIDE 06-1294

In the Supreme Court of the United States

THE ESTATE OF ROGER ROXAS AND
THE GOLDEN BUDHA CORPORATION,
Petitioners,

v.

MARIANO J. PIMENTEL, on behalf of himself
and all other persons similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY TO PIMENTEL

DANIEL C. CATHCART
Counsel of Record
LADELL HULET MUHLESTEIN
MAGAÑA, CATHCART & McCARTHY
1801 AVENUE OF THE STARS, SUITE 600
LOS ANGELES, CA 90067-5801
(310) 553-6630
(310) 407-2295 FAX

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

RULE 29.6 STATEMENT

Defendants refer to and by this reference incorporate the corporate disclosure statement contained in their Petition for Writ of Certiorari.

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INTRODUCTION

Petitioners submit that the judgment of the district court was a usurpation of jurisdiction not granted the federal courts. The decision of the Ninth Circuit Court of Appeals affirming the district court's judgment was erroneous and so deficient in substance as to deprive Petitioners of their right of appeal. The attention of this Court is necessary to correct these errors and resolve important issues as to the scope and applicability of the probate exception to federal court jurisdiction and the adversity requirements of the federal interpleader statute.

I. NO COURT MAY PROCEED WITHOUT JURISDICTION OF THE MATTER AND THE PARTIES BEFORE IT.

A. A Federal Court May Not Control Estate Assets.

In their Opposition Brief the Pimentel claimants correctly urge that they are entitled "to establish their claims" in federal court. (Pimentel Claimants' Brief in Opposition (hereinafter "P. Opp. Brf.," p. 22.) However, while the courts hold that parties may obtain a judgment in federal court, they also hold that such a judgment cannot be satisfied by distribution of Estate assets by a federal court. This Court declared in *Byers v. McAuley,* 149 U.S. 608, 620, 13 S.Ct. 906 (1893) (emphasis added): "A [claimant] . . . may establish a debt against the estate. [Citations omitted.] But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent."

The Pimentel claimants argue that this case is not subject to the probate exception because the Estate asset was deposited with the district court in the course of this interpleader action

before a probate proceeding was opened. (P. Opp. Brf. p. 23.) The Pimentel claimants rely on *Markham v. Allen,* 326 U.S. 490, 494, 66 S.Ct. 296 (1946) and *Marshall v. Marshall,* 547 U.S. 293, 126 S.Ct. 1735 (2006). Neither case supports their position.

The *Markham* Court's holding was not a deviation from the earlier Supreme Court cases cited by Petitioners. This Court declared that the scope of the probate exception has been established by a "long series of decisions of this Court." *Id.* at 494. In Markham this Court simply acknowledged federal court jurisdiction to adjudicate rights to probate property so long as the judgment does not interfere with the state courts' possession of the property. *Id.* Significantly, in *Markham* this Court suggested that it would have ruled differently, as this Court should, had the final order effected distribution of the assets, instead of merely determining the claimants' rights. The Court specifically noted that the effect of the district court judgment was merely to decree petitioner's rights and leave undisturbed the orderly administration of the estate in the state probate court. *Id.*

In *Marshall v. Marshall,* this Court recognized the probate exception to federal jurisdiction. *Marshall v. Marshall,* 547 U.S. 293, 126 S.Ct.1735, 1746 (2006). The facts of the *Marshall* case are so different from the facts of this case, that it provides no guidance here. In the *Marshall* case: (1) the action was for a widely recognized tort; (2) the action was an in personam action; (3) the action did not seek to reach a res; (4) the action concerned fraud and duress which is conduct trial courts often address and as to which probate courts have no specific proficiency in handling; (5) the federal court had broad jurisdiction under the bankruptcy statute; and (6) under Texas law probate courts do not have exclusive jurisdiction of tort claims respecting interference with gift or inheritance.

Marshall, supra, at 1746, 1748-1750. The Court held that an in personam claim for interference with gift or inheritance can be heard in a bankruptcy proceeding. The Court noted that the claim fell far outside the bounds of the probate exception described in *Markham* and declined to consider the scope of the probate exception to federal bankruptcy jurisdiction. *Id.* at 1746. Petitioners agree that the probate exception would not apply on the facts of the *Marshall* case. The instant interpleader action is fundamentally different in nature from, and goes beyond, the *Markham* case. Its unique purpose is to consider competing claims, such as the Pimentel claimants' judgment, against assets of the Estate for distribution of the fund. It is akin to the distribution judgment specifically distinguished by the *Markham* Court.

The Pimentel claimants point to language prohibiting federal court "control of the property in the custody of the state court." (*Markham* at 494, cited at P. Opp. Brf. pp. 22-23.) In *Marshall* this Court declared that this language in *Markham* proscribed "disturbing" or "affecting" the "possession of property" in the custody of a state court. *Marshall, supra,* at 1748. The language referring to the custody of probate courts is to be expected inasmuch as there were on-going probate proceedings in those cases. However, nothing in the cases suggests that application of the probate exception turns on which court is first to take possession of the res, on an unseemly race to the res.[1] Instead, its application turns whether the court's judgment controls, disturbs or affects Estate

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[1] The history of efforts to open probate proceedings with respect to other Marcos-related assets is irrelevant because if this action were dismissed for lack of jurisdiction and this Court thereby divested of its possession of the fund, there would be no impediment to the commencement of a probate proceeding relative to this Marcos-related asset.

property. The Pimentel claimants argue that the fund belongs in the Marcos Estate, of which a probate court would have jurisdiction and could take possession upon the commencement of a probate proceeding. The reason for focusing on the effect on the Estate property is demonstrated by this case, where there was no opportunity to commence a probate proceeding due to the preemptive actions of a crusading district court judge who quickly secured possession of the Merrill Lynch account to the district court[2] in a questionable and unorthodox manner.[3] (ROP Opp. Brf.)

In *Byers v. McAuley, supra,* 149 U.S. at 620 the Court foresaw such a circular argument as the Pimentel claimants make here - that possession of the res by the federal court precludes the probate exception and thereby, in effect, creates federal jurisdiction. The Court held that a federal court will not entertain an action if the relief requested (here, distribution of estate assets) might have the practical effect of drawing possession of a probate res to the federal court. Because the federal court did not have jurisdiction of the administration of estates, the Court noted, the federal court cannot by entertaining jurisdiction of a suit against the administrator "draw to itself the . . . possession of the estate." *Id.* at 618-619.

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[2] This is not the only attempt the district court judge made to obtain possession of alleged Estate assets. See, the discussion and citations set forth in the Brief in Opposition of the Philippine Government-related Respondents (hereinafter "ROP Opp. Brf."), at p. 5, describing the district court's attempt to order Swiss banks to transfer assets to the district court and to commence an interpleader action.

[3] The actions of the district court in soliciting the interpleader case were so egregious as to form the basis of a motion by the Philippine Government claimants to recuse the judge.

The Court's holding that federal courts may not control Estate assets remains unchanged. Just last year, in the *Marshall* case the Court specifically noted that the subject action did not seek to reach a probate res. *Marshall, supra,* at 1748.

The fund is alleged by the Pimentel claimants to be a probate res; therefore, it falls under the umbrella of probate jurisdiction regardless of whether a formal probate proceeding has been opened. A federal court may not invade that most basic function of probate jurisdiction - control of probate assets - by taking control of an Estate asset and claim that it has therefore defeated probate jurisdiction because of its possession of the res.

B. A Party Against Whom a Court Has Ruled is Not Barred From Asserting that the Court Had No Jurisdiction, and May Do So at any Stage of the Proceeding.

As obvious as this proposition is, the Pimentel claimants argue that Petitioners, having lost below, have no right to contest the jurisdiction of the Court. (P. Opp. Brf. p. 26.) The Pimentel claimants actually declare, "These jurisdictional issues are irrelevant as they apply to the Golden Budha/Roxas petitioners, which have failed to prove [their] claim." *Id.* The Pimentel claimants also argue that Petitioners' assertions that the Court lacks jurisdiction based on the absence of an indispensable party and for failure of the Pimentel claimants to meet the jurisdictional requirements of the interpleader statute were not raised below and are therefore barred. (P. Opp. Brf. pp. 16, n. 14; 28, n.15.) Lack of jurisdiction may be raised at any stage of the proceeding. *Kontrick v. Ryan,* 540 U.S. 443, 455, 124 S.Ct. 906 (2004), citing and describing case in which a judgment loser successfully raised lack of jurisdiction for the first time before the Supreme Court. Furthermore,

federal courts "are obligated to inquire into subject matter-jurisdiction *sua sponte* whenever it may be lacking. *Cadet v. Bulger,* 377 F.3d 1173, 1179 (11th Cir. 2004).

The outcome of the Court's ruling is not moot as to these Petitioners. If the Court had no jurisdiction to award the fund to the Pimentel claimants, these Petitioners live to litigate another day. Petitioners' offered substantial evidence that the subject account derived from the treasure stolen from them by Marcos, all of which was excluded by the trial court on the basis of erroneous applications of the rules of evidence.[4] The Ninth Circuit never examined these erroneous rulings. This evidence can be reintroduced in a subsequent proceeding or in a probate proceeding.

C. The Estate is an Indispensable Party to this Action to Distribute Its Assets.

Contrary to the Pimentel claimants claims, the Estate was not a party to this action. An examination of the docket sheet in this case and the complaint fails to disclose that whoever may have been served was an authorized, court appointed personal representative of the Estate of Marcos.

The Pimentel claimants claim that the Estate is not an indispensable party. They claim, it is clear that a judgment awarding the entirety of the fund to them caused minimal prejudice to the Estate. The Estate is not an ordinary party. In resisting the Pimentel claimant's claim to the assets, the Estate

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[4] *See* detailed discussion of the scope of the evidence offered and the erroneous, wholesale exclusion of Petitioners' evidence at pp. 23 - 27 of the Petition and the earlier discussion in Petitioners' Opening Brief to the Ninth Circuit Court of Appeals.

would protect the interests of all other claimants to the Estate assets. Proceeding in the absence of the Estate in an action in which notice has not been afforded to potential claimants allows for "cherry-picking" of the assets by the claimant with the tallest ladder, to the detriment of the remaining claimants who are not party to the proceeding. A claim, like the Pimentel claimants', established in federal court, "must take its place and share of the estate as administered by the probate court ; and it cannot be enforced by process directly against the property of the decedent." *Byers, supra,* at 620.

D. General Judgment Creditors Lack the Adversity Necessary to Meet the Interpleader Statute's Jurisdictional Requirements.

The Pimentel claimants assert that they sued Merrill Lynch for the subject account on the basis of a judgment against Marcos and reiterated their claim in this interpleader action. (P. Opp. Brf. p. 28.) The Pimentel claimants are general judgement creditors and lack the adversity required for jurisdiction under the interpleader statute. The centuries of common law recognizing the right of judgment creditors to collect against debtors is wholly irrelevant here. The interpleader procedure is statutory. Participants must comply with the terms of the statute to obtain the statutory remedy. Otherwise, they may pursue the common law remedies to which the Pimentel claimants refer.

The Pimentel claimants assert that "[n]o case holds that a judgment creditor cannot be a proper claimant to an interpleaded fund . . . ." (P. Opp. Brf. p. 29.) They are wrong. See the cases cited by Petitioners at pages 18 - 23 of the Petition and at pages 19 - 23 of Petitioners opening brief to the Ninth Circuit.

E. The Pimentel Claimants' Judgment is Deemed Satisfied by Operation of Law. The Rights Represented by the Judgment Cannot Serve as the Basis of a Claim.

Exhibit H attached to the Petition for Writ of Certiorari sets forth the critical dates which establish that the statute of limitations on judgments has run on the Pimentel plaintiffs and under applicable law those parties are conclusively presumed to have had their judgment against the Marcos estate to have been paid in full. There are no exceptions, nor does the statute allow extensions of the statute of limitations unless an application for an extension is filed BEFORE the expiration of the ten years. The Pimentel plaintiffs applied for an extension AFTER the time expired. This is not permitted. An appeal is pending in the Ninth Circuit bearing docket # 06-16301.

The Pimentel claimants fail to discuss this determinative issue in their Brief In Opposition. They have no way out.

II. THE COURT OF APPEALS WAS OBLIGATED TO CONSIDER PETITIONERS' ASSERTION ON APPEAL THAT THE DISTRICT COURT LACKED JURISDICTION, BUT REFUSED TO DO SO.

In response to Petitioners' argument that they were denied any meaningful appeal, the Pimentel claimants characterized as "well reasoned" the Ninth Circuit's Opinion, which did not address any of the foundational jurisdictional issues pressed by Petitioners and devoted only its last two paragraphs to Petitioners' issues, without offering any analysis or citing any authority. (P. Opp. Brf. p. 29. "Having disposed of . . . [P]etitioners' claims . . .," the Pimentel claimants assert, the Ninth Circuit was not obligated to address Petitioners'

arguments. (P. Opp. Brf. p. 30.) The right of appeal means nothing if it is available only to winners who do not need it. The Court of Appeals was obligated to consider and rule upon Petitioners' jurisdictional arguments.

Petitioners were entitled to consideration of their assertions of error on issues which logically precede the district court's ruling distributing the fund to the Pimentel claimants because if the fund could not be distributed to the Pimentel claimants, claims to the fund could be litigated again in other fora. Whether the court had subject-matter jurisdiction of the action, whether the Pimentel claim failed for lack of adversity, and whether evidence that the fund derived from property stolen by Marcos precluded its use to satisfy claims against Marcos all must logically precede any order to distribute the fund. The failure of the Court of Appeals to address any of them deprived Petitioners of a meaningful right of appeal.

CONCLUSION

Most, if not all, of the problems and issues disappear if this matter is handled in a probate proceeding. Problems such as sovereign immunity, indispensable parties, and interest in the fund, adversity and jurisdiction should not arise. They arise here because the trial court went way beyond the finding of estate property, to the handling of claims against an estate, determining the priority of claims and finally the distribution of estate assets.

Petitioners pray that their Petition for Writ of Certiorari be granted and the judgment in the district court be vacated and reversed as exceeding the jurisdiction of the federal courts, or in the alternative, that the Opinion of the Ninth Circuit be reversed and the Ninth Circuit be directed by this court to enter an Opinion on the issues raised by Petitioners consistent with

the decisions of the United States Supreme Court.

Respectfully submitted,

MAGAÑA CATHCART & MCCARTHY
DANIEL C. CATHCART
LADELL HULET MUHLESTEIN

Attorneys for Petitioners The Estate of Roger Roxas and The Golden Budha Corporation

11-02-07

Nos. 06-1039 & 06-1204

In the Supreme Court of the United States

ESTATE OF ROGER ROXAS, ET AL., PETITIONERS

v.

MARIANO J. PIMENTEL, ET AL.

REPUBLIC OF THE PHILIPPINES, ET AL., PETITIONERS

v.

MARIANO J. PIMENTEL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

MICHAEL S. RAAB
SARANG V. DAMLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN B. BELLINGER, III
Legal Adviser
Department of State
Washington, D.C. 20520

QUESTIONS PRESENTED

This interpleader action was brought to settle ownership of certain assets allegedly misappropriated by Ferdinand Marcos when he was President of the Republic of the Philippines. The assets are claimed by several parties, including the Philippines (which under Philippine law is the owner of property acquired through the misuse of public office by Philippine officials), a class of judgment creditors of the Marcos estate, and a judgment creditor of Marcos's wife, Imelda Marcos.

In No. 06-1204, *Republic of the Philippines* v. *Pimentel*, the question presented is:

Whether a foreign sovereign that is a necessary party to a lawsuit under Fed. R. Civ. P. 19(a) and has successfully invoked sovereign immunity is, under Rule 19(b), an indispensable party to an action brought in the courts of the United States to settle ownership of assets claimed by that sovereign.

In No. 06-1039, *Estate of Roxas* v. *Pimentel*, the questions presented are:

1. Whether the probate exception to federal court jurisdiction eliminated the district court's jurisdiction over the action.

2. Whether the district court should have dismissed the case because the Estate of Ferdinand Marcos was an indispensable party to the action.

3. Whether the district court lacked jurisdiction over the action because the Pimentel claimants presented no ownership or lien claim against the fund.

4. Whether the court of appeals violated petitioners' right to appeal by failing to address certain of petitioners' arguments.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the views of the United States. In the United States' view, the petition for a writ of certiorari in No. 06-1204 should be granted, and the petition for a writ of certiorari in No. 06-1039 should be held pending disposition of No. 06-1204.

STATEMENT

1. Ferdinand Marcos was President of the Republic of the Philippines (Philippines) for nearly 20 years. In 1972, Marcos created Arelma S.A. (Arelma) under the laws of Panama. Pet. App. 43a.[1] That same year, an account in the name of Arelma was opened at Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch) in New York. *Id.* at 45a. The funds placed into that account were allegedly obtained by Marcos through misuse of his public office. *Ibid.*; ER 106, 174-251. Ownership of Arelma is represented by two bearer share certificates that are held in escrow by the Philippine National Bank (PNB), after being transferred there by an order of the Swiss Federal Supreme Court. Pet. App. 43a, 46a, 49a.

The assets in the Merrill Lynch account are the subject of this interpleader action. Arelma claims the assets based on its ownership of the account; PNB's claim is based on its custody of the Arelma bearer share certificates. The Philippines and the Philippine Presidential Commission on Good Government (PCGG) claim the funds under a Philippine statute (Rep. Act. No. 1379, 51:9 O.G. 4457 (June 18, 1955)) providing that any property acquired by a public officer through misuse of his office is forfeited to the government *ab initio*.

Respondent Mariano Pimentel represents a class of human rights victims (Pimentel claimants) who obtained a $2 billion judgment against the Marcos estate in February 1995. See *Hilao* v. *Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996). The

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[1] Unless otherwise noted, references to "Pet. App." are to the appendix in No. 06-1204. Arelma, S.A. is named in this action as Arelma, Inc. Pet. App. 43a.

Pimentel claimants seek to execute that judgment against the Merrill Lynch account, claiming that Arelma was a shell created to hide Marcos's personal assets. Br. in Opp. 3, 5.

Petitioners Estate of Roger Roxas and Golden Budha Corporation (Roxas claimants) obtained a $19 million Hawaii state court judgment against Imelda Marcos, Marcos's wife, in October 1996, based on claims of torture, imprisonment, and theft of a treasure owned by Roxas. See *Roxas* v. *Marcos*, 969 P.2d 1209, 1231-1233 (Haw. 1998). The Roxas claimants seek to execute their judgment against the Arelma account, and further claim that the money used to fund the Arelma account derives from the stolen Roxas treasure. Pet. App. 31a; 06-1039 Pet. App. 73a-77a.

2. After Marcos's rule ended in 1986, the Philippine government created PCGG to recover Marcos's illegitimate wealth, much of which had been removed from the Philippines. ER 110. In April 1986, PCGG made a request to the Swiss government for mutual assistance, seeking return of Marcos's assets, including the Arelma shares. ER 288, 313. The Swiss government froze those assets and the Swiss Federal Supreme Court upheld the freeze in 1990. ER 348-349.

In 1991, PCGG commenced a forfeiture proceeding against Marcos in the Sandiganbayan, a Philippine court with jurisdiction over political corruption cases, based on the Philippine statute providing for forfeiture of property obtained through misuse of public office. ER 174-251.

In late 1997 and early 1998, while the forfeiture action was pending, the Swiss Federal Supreme Court transferred the frozen assets to an escrow account at PNB pending a final ownership determination by the Philippine courts. ER 289, 347-385. After the Swiss assets were transfered to the PNB escrow account, ER 157-160, PCGG asked Merrill Lynch to transfer the assets it held for Arelma to that account, ER 162, 387. Merrill Lynch declined, noting that the transfer of the

Arelma shares to PNB was provisional only, and that there were a number of other claimants to the fund. ER 393-395.

On September 19, 2000, the Sandiganbayan granted PCGG's motion for partial summary judgment, holding that the assets at issue in the motion were forfeited to the Philippines under Philippine law. ER 254-283. Although the Sandiganbayan later reversed its own decision, the Philippine Supreme Court reinstated the partial judgment in the Philippines' favor on July 15, 2003. ER 597-696.

3. On September 14, 2000, Merrill Lynch commenced this interpleader action in federal district court in Hawaii to settle competing claims to the Arelma account's assets. ER 34. As required by 28 U.S.C. 1335(a), Merrill Lynch deposited the account's assets, $35 million, with the court. Pet. App. 46a.

The Philippines and PCGG asserted sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1604, and moved to dismiss the interpleader action, claiming that their unavailability required dismissal under the rules for compulsory joinder. See Pet. App. 31a-32a; Fed. R. Civ. P. 19(b). The district court instead dismissed the claims of the Philippines and PCGG on the merits, without addressing their claim of sovereign immunity. Pet. App. 32a.

On October 31, 2002, the court of appeals held, on interlocutory appeal, that the Philippines and PCGG were immune from suit in the interpleader proceedings under the FSIA. Pet. App. 36a-39a. The court also found the Philippines and PCGG to be necessary parties who should "be joined if feasible" under Rule 19(a), since "[w]ithout the Republic and the PCGG as parties in this interpleader action, their interests in the subject matter are not protected." *Id.* at 40a. While the court noted that the Philippines' and PCGG's unavailability militated in favor of dismissal under Rule 19(b), it also recognized that the Pimentel claimants and Merrill Lynch had competing interests. *Id.* at 41a. Rather than resolve that conflict, the court noted that Merrill Lynch, the Philippines, and

PCGG had agreed to a stay of the interpleader suit pending resolution of claims in the Philippines. *Id.* at 42a. The court ordered entry of a stay, noting that "later developments may render it more equitably feasible for proceedings to go forward in this case," such as "resolution of the litigation in the Philippines" or a change in the parties' immunity status. *Ibid.*

On June 20, 2003, the district court vacated the stay, concluding that the outcome of the proceedings before the Sandiganbayan would not affect the interpleader action because the district court had exclusive jurisdiction over the Arelma assets. ER 697-699. On February 20, 2004, the court of appeals affirmed the lifting of the stay. ER 779-782.

On August 14, 2003, while the appeal from the order lifting the stay was pending, the district court denied the Philippines and PCGG's motion to dismiss the case under Rule 19(b). Pet. App. 55a-60a. The court held that the Philippines and PCGG did not have a "legally protectible claim" that would be impaired by the proceedings because any claim they might have would be barred by New York's statute of limitations. *Id.* at 57a-59a. The court also rejected the claim that the disputed assets were implicated by the just-concluded forfeiture proceeding in the Philippines. The court found that the forfeiture petition filed in 1991 did not "seek[] forfeiture of the assets in the Arelma account at Merrill Lynch," and that the Philippine Supreme Court decision made no mention of Arelma or the Arelma account at Merrill Lynch. *Id.* at 56a.[2] The court further found a lack of proof that the Philippines and PCGG had claimed ownership of the Arelma share certificates. *Ibid.* The court concluded that, in any event, "[o]wnership of the Arelma share certificates is irrelevant to this proceeding since Arelma is a party actively seeking control of the assets at

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[2] The Philippines and PCGG contend that the 1991 forfeiture petition did in fact seek forfeiture of the Arelma shares and its assets. 06-1204 Pet. 4. The forfeiture petition does refer to Arelma and the Merrill Lynch account, though not in the context of a specific request for forfeiture. ER 234.

issue and Arelma's shareholders have no standing to pursue assets allegedly belonging to the corporation." *Id.* at 57a.

The district court held a bench trial to adjudicate the remaining claims to the Arelma account, and on July 12, 2004, awarded the entirety of the Arelma assets to the Pimentel claimants. Pet. App. 43a-54a. The court noted that the Pimentel claimants' judgment was against Marcos personally, rather than Arelma. *Id.* at 49a. However, the court found that because Arelma was merely the "*alter ego* and instrumentality of Ferdinand E. Marcos," it could "reverse" pierce the corporate veil and find that the proceeds of the account held at Merrill Lynch were in fact owned by Marcos. *Id.* at 52a, 54a. For the same reason, the court rejected the separate claim of Arelma to the funds. *Id.* at 54a.

The district court also rejected the claims of the other claimants. It found that PNB "lack[ed] standing" to claim the assets in its capacity as escrow holder of the Arelma shares because "[a]n individual shareholder, by virtue of ownership of shares, does not own the corporation's assets." Pet. App. 52a (quoting *Dole Food Co* v. *Patrickson*, 538 U.S. 468, 475 (2003)). The court also rejected the claim of the Roxas claimants, finding that they had not proved that the assets in the Arelma account derived from property stolen from Roxas, and that their claims were, in any event, inferior to those of the Pimentel claimants. *Id.* at 49a, 53a-54a; ER 944.

4. On July 19, 2004, the Philippines and PCGG filed a motion with the Sandiganbayan, as part of the forfeiture proceedings begun in 1991, claiming that the "ARELMA account is now ripe for forfeiture." See Request for Judicial Notice, Ex. A at 9. It thus prayed that "judgment be rendered declaring the funds, properties, shares in and interests of ARELMA, wherever they may be located, as ill-gotten assets and forfeited in favor of the Republic of the Philippines." *Ibid.* That motion is still pending before the Sandiganbayan.

5. The Philippines and PCGG appealed the denial of their motion to dismiss under Rule 19(b). Arelma, PNB, and the Roxas claimants appealed the award of the assets to the Pimentel claimants. The court of appeals affirmed. Pet. App. 1a-11a. The court acknowledged that in "the usual case of interpleader" a sovereign party that cannot be joined due to immunity "is indispensable and so can cause dismissal of the action." *Id.* at 6a. Here, however, the court held that other factors outweighed the Philippines' and PCGG's immunity.

The court of appeals found that the Philippines' failure to obtain a judgment in the Philippines as to the ownership of the assets, even though the Arelma shares had been in escrow at PNB since 1995, was "an equitable consideration * * * to be taken into account." Pet. App. 7a. The court recognized that "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." *Id.* at 9a. But the court concluded that the Philippines would not be prejudiced by the interpleader action because "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." *Id.* at 7a. The court reasoned that any action by the Philippines against Merrill Lynch would be barred by New York's six-year statute of limitations for actions based on misappropriation of public property. *Id.* at 8a-9a (citing N.Y. C.P.L.R. 213 (McKinney Supp. 2007)).

Responding to the Philippines' contention that "it could obtain a judgment regarding the ownership of these assets in the Philippines where it is relieved of any statute of limitations," the court of appeals concluded that the Philippine courts "would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. Accordingly, if a Philippines court issued such a judgment, a court in this country "would not be bound to give it effect," and the assets could not be "finally disposed of except by judgment of a court in the United States." *Id.* at 7a-8a.

In considering the adequacy of the judgment in the absence of the Philippines and PCGG, the court found that the award would have some "symbolic significance" to the "victims of the former president of the Republic." Pet. App. 9a. Although most of the Pimentel claimants were Philippine citizens who "should find redress from their own government," the court found that consideration to be "outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the[ir] president." *Id.* at 9a-10a. The court also concluded that the Pimentel claimants would have no forum in the Philippines in which to raise their claims to the Arelma assets. *Id.* at 10a.

After balancing the factors, the court of appeals concluded that "[n]o injustice" would be done to the Philippines "if it now loses what it can never effectually possess." Pet. App. 10a. The court therefore affirmed the award of the Arelma assets to the Pimentel claimants, and also rejected claims of error raised by the Roxas claimants. *Id.* at 10a-11a.

DISCUSSION

The Ninth Circuit's indispensibility analysis under Rule 19(b) was flawed in significant respects. The court gave insufficient weight to the absent parties' sovereign immunity from suit, and improperly (and incorrectly) prejudged the merits of the immune parties' claims. The Ninth Circuit's decision conflicts with decisions of this Court and other courts of appeals. The decision also raises significant concerns with respect to the Nation's foreign relations. It prejudices ongoing litigation in the Philippines regarding a matter of great public concern to that country, conflicts with an understanding between the Philippines and Switzerland regarding adjudication of the Marcos assets, and threatens to undermine the ability of the United States to enforce its forfeiture judgments abroad as well as to assert sovereign immunity in foreign courts in similar circumstances. The United States therefore recommends

that the certiorari petition filed by the Philippines and PCGG (No. 06-1204) be granted, and that the petition in No. 06-1039 be held pending disposition of No. 06-1204.

I. THE COURT OF APPEALS' APPLICATION OF RULE 19(b) WITH RESPECT TO IMMUNE ABSENT PARTIES WARRANTS THIS COURT'S REVIEW

Federal Rule of Civil Procedure 19 provides for mandatory joinder of persons "needed for just adjudication." Rule 19(a) describes persons who must be joined in an action if feasible. For example, under Rule 19(a)(2)(i), if a person "claims an interest relating to the subject of the action" and "disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest," that person must be joined.

If a person described in Rule 19(a) cannot be made a party for some reason, the court must determine, under Rule 19(b), "whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party thus being thus regarded as indispensable." Rule 19(b) includes four "factors" to consider in such a case:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"The decision whether to dismiss * * * must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 118-119 (1968) (*Provident Bank*).

In its first opinion in this case, the court of appeals held that the Philippines and PCGG are immune from jurisdiction under the FSIA. Pet. App. 30a-39a.[3] The court further held that the Philippines and PCGG are parties that should be joined if feasible, and that it was "difficult to see how this interpleader action can proceed in their absence." *Id.* at 40a-41a. On that basis, the court of appeals entered a stay pending future proceedings in the Philippines. *Id.* at 42a.

Later, however, the court of appeals concluded that the absence of the Philippines and PCGG did not require that the interpleader action be stayed or dismissed under Rule 19(b). Pet. App. 6a-10a. That decision failed to take appropriate account of the fact that the Philippines' and PCGG's absence is due to their immunity from suit, and was premised on other legal errors as well. Its ruling, which conflicts with the approach of other courts of appeals and interferes with significant foreign policy interests, warrants this Court's review.

A. The Immunity Of An Absent Party Is A Very Significant Consideration In The Analysis Under Rule 19(b)

This Court has recognized the importance of sovereign immunity to the Rule 19 analysis in cases where the United

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[3] Respondents do not challenge the determination that the Philippines and PCGG have immunity to this interpleader action. We note that in *Cory* v. *White*, 457 U.S. 85 (1982), the Court held that the Eleventh Amendment barred an interpleader suit seeking "resolution of inconsistent tax claims by the officials of two States." *Id.* at 86, 91. In two more recent cases, *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004), and *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the Court held that the Eleventh Amendment did not bar a federal court from exercising in rem jurisdiction with respect to a bankruptcy estate or a shipwrecked vessel. In both cases, however, the Court's analysis emphasized the fact that the district court was exercising in rem jurisdiction pursuant to a specific constitutional grant of federal authority over the res. *Hood*, 541 U.S. at 446-451 (bankruptcy); *Deep Sea Research*, 523 U.S. at 501, 506-507 (admiralty). Here, in contrast, there is no specific constitutional grant of authority over the res, and the federal court's power to adjudicate the claims therefore stems solely from its jurisdiction over the claimants, as to which a party may assert its immunity.

States is the absent party. See *California* v. *Arizona*, 440 U.S. 59 (1979); *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375 (1945); *Minnesota* v. *United States*, 305 U.S. 382, 386-388 (1939); see also 7 C. Wright et al., *Federal Practice and Procedure* § 1617, at 254 (2001) (Wright & Miller) ("No doubt because of the sovereign-immunity concept, the application of Rule 19 in cases involving the government reflects a heavy emphasis on protecting its interests."); 4 J. Moore et al., *Moore's Federal Practice* § 19.05[2][c] at 19-91 (2006) (*Moore's*) ("[C]ourts are reluctant to require the absentee to protect its own interest if intervention would result in the absentee's waiving an immunity to suit.").

Similarly, a number of courts of appeals have held that an absent party's sovereign status is entitled to special weight under Rule 19(b). For example, in dismissing a suit where the absent party was an Indian Tribe, the D.C. Circuit stated: "This is not a case where some procedural defect such as venue precludes litigation of the case. Rather the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 (1986); see *Fluent* v. *Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir.) (recognizing the "paramount importance accorded the doctrine of sovereign immunity under [r]ule 19"), cert. denied, 502 U.S. 818 (1991); *Enterprise Mgmt. Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989) (where "a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves") (internal quotation marks omitted).

That is not to suggest that an immune sovereign is automatically indispensable. For instance, in some cases the interests of the absent sovereign may be properly and adequately protected by the parties remaining in the suit, and in

others relief may be structured so as not to prejudice the absent party. See, *e.g.*, *Wichita & Affiliated Tribes*, 788 F.2d at 774; cf. *Heckman* v. *United States*, 224 U.S. 413, 444-445 (1912) (finding that interests of absent Indian grantors were adequately represented by the United States). But even though the Philippines' and PCGG's immunity was not in itself outcome determinative under Rule 19(b), it should have received far greater weight than it did. Indeed, the court of appeals recognized that its analysis conflicts with the approach of other courts of appeals on this issue. See Pet. App. 61a-62a.

B. The Court Of Appeals' Rule 19(b) Analysis Was Flawed In Other Respects As Well

1. Central to the court of appeals' reasoning concerning the first factor in Rule 19(b) was its conclusion that the Philippines and PCGG would not be prejudiced by a judgment rendered in their absence because they had "no practical likelihood of obtaining the Arelma assets." Pet. App. 10a. The court found that any claim by the Philippines to the assets would be barred by New York's six-year statute of limitations for misappropriation of public funds. *Id.* at 8a-9a (citing N.Y. C.P.L.R. 213 (McKinney Supp. 2007)). By resting its analysis so heavily on its assessment of the merits of the Philippines' and PCGG's claims, the court in effect deprived them of the benefit of their sovereign immunity.

While this Court has not ruled out consideration of the underlying merits of a claim in the course of determining the extent of prejudice to an absent party from adjudication without his participation, see *Provident Bank*, 390 U.S. at 115 (noting that it would have been proper to explore the likelihood that claims against the absent party would result in recoveries against him and therefore claims by him against the fund), it is particularly problematic for a court to assess the merits of an absent party's own claim when the party's absence is due to its sovereign immunity from the court's juris-

diction. The immune party would either have to participate in the litigation (despite its immunity) in order to argue the merits of its claim, or risk the possibility that the court will, as here, underestimate the strength of the party's interest and evaluate the absent sovereign's claim based on the arguments of the present and hardly disinterested other litigants.

In this case, moreover, the lower courts' assessment of the strength of the immune parties' interests was mistaken. Contrary to the court of appeals' assumption that the Philippines would have to sue Merrill Lynch in New York court to litigate its claim that Marcos obtained the assets illegally, that claim by the Philippines can properly be litigated in a Philippine court. The Philippines' claim to Arelma and its assets is based on Philippine law providing that property misappropriated by public officers through abuse of their office is forfeited to the Philippines from the moment it is obtained. Pet. App. 2a-3a. A special Philippine court—the Sandiganbayan—is vested with authority to adjudicate disputes under that statute. Indeed, the Philippines and PCGG are presently seeking forfeiture of the Arelma shares and Arelma's assets in that court, and a fully briefed motion for summary judgment with respect to those assets is pending before it.

If the Sandiganbayan awards the Arelma shares and assets to the Philippines, there is no reason to assume that the Philippines would have to sue Merrill Lynch to obtain the assets in Arelma's Merrill Lynch account. Rather, the Philippines, either directly or through Arelma, would simply request that Merrill Lynch transfer the assets in Arelma's account to an account in the Philippines. If Merrill Lynch were to refuse, the Philippines (or Arelma) might have to bring suit, but the suit would be based on that new breach of contract, not on the underlying claim (already adjudicated by the Sandiganbayan) that Marcos obtained the original assets illegally.

The court of appeals believed that "a court of this country would not be bound to give * * * effect" to a judgment by

the Sandiganbayan regarding ownership of the Arelma account and its assets because "a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States." Pet. App. 8a. The court erred in announcing so categorical a rule regarding a claim that would be better evaluated when a U.S. court has before it an actual judgment by a Philippine court. It is unnecessary for this Court to decide whether a court in the United States would *always* be bound by a foreign court's judgment of forfeiture. It is sufficient to recognize that the court's categorical rule that United States courts would *never* enforce a foreign judgment of forfeiture relating to assets located in the United States is erroneous.

There are without question instances in which a foreign judgment of forfeiture relating to assets located in the United States may be recognized and enforced by a court here. Indeed, a federal statute specifically provides for enforcement of foreign judgments of forfeiture in certain circumstances. See 28 U.S.C. 2467(c) (upon certification by the Attorney General, "the United States may file an application on behalf of a foreign nation in [a] district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States"). Further, the Treaty on Mutual Legal Assistance in Criminal Matters (MLAT), Nov. 13, 1994, U.S.-Phil., Art. 16, S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1995), and chapters IV and V of the United Nations Convention Against Corruption, G.A. Res. 4 (LVIII), U.N. Doc. A/RES/58/4, at 22, 32 (2003), contemplate cooperation by the two countries on proceedings related to asset forfeiture.

The MLAT, for example, generally requires the parties, as permitted by their domestic law, to assist each other when the object of a forfeiture proceeding in one country is located within the other country. The MLAT presupposes the existence of jurisdiction of Philippine courts over assets located

in the United States, and vice versa. And, in fact, courts in the United States do sometimes exercise jurisdiction in civil forfeiture proceedings over property located outside the United States. See 28 U.S.C. 1355(b)(2) ("Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, * * * an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.") (footnote omitted).[4]

Moreover, even assuming arguendo that the Philippine courts could not adjudicate ownership of the actual assets held in the Merrill Lynch account, it is undisputed that the Philippine courts have jurisdiction to determine the ownership of Arelma itself, as the share certificates are being held in escrow in the Philippines. If ownership of Arelma were awarded to the Philippines by the Sandiganbayan, there is no reason to assume, as the court of appeals did, that a court in the United States would refuse to recognize that judgment.

The court of appeals' analysis of the first Rule 19(b) factor also failed to take into account the logical priority of the Philippines' and PCGG's claims over those of the Pimental claimants. The Pimentel claimants do not assert that they are the rightful owners of the assets in Arelma account. Rather, as holders of a judgment against the Marcos estate, the Pimentel claimants ask the court to ascribe the Arelma assets to the Marcos estate through "'reverse piercing' of the corporate veil," and then to award those assets to them in partial satisfaction of their judgment against the Marcos estate. Pet. App. 52a. Thus, the Pimental claimants' claim depends upon a determination that the assets are really Marcos assets. If the Sandiganbayan determines that Arelma and its assets are

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[4] If the Philippine judgment did not qualify for enforcement under Section 2467(c), there would be a further question whether the judgment would qualify for recognition under principles of international comity. See *Hilton* v. *Guyot*, 159 U.S. 113, 163-164 (1895).

forfeited under Philippine law, it would mean that those assets have been owned by the Philippines since the time Marcos first obtained them.[5] The claims of the Pimentel claimants against those assets would thereby be vitiated. They would then be seeking to execute a judgment that they possess vis-a-vis *Marcos* against assets of the *Philippines*.

2. The court of appeals' erroneous conclusion that the Philippines would not be prejudiced by continuation of the interpleader action led it to give no consideration to the second Rule 19(b) factor: "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." Pet. App. 9a. This case involves mutually exclusive claims to a common fund: the Philippines and PCGG claim the entire amount as property of the Philippines, the Pimentel claimants' judgment far exceeds the value of the Arelma assets, and the Roxas claimants' judgment represents over half the amount of the assets. In such a situation, as the court of appeals recognized in its initial ruling, *id.* at 40a, it would be nearly impossible to shape relief so as to avoid harm to the absent parties. See *Provident Bank*, 390 U.S. at 115; see also 4 *Moore's* § 19.05[3], at 19-94 to 19-95 (noting possibility of partial distribution of undisputed portion of fund or requiring that security be posted for the disputed amount).

3. The court of appeals also misinterpreted the third Rule 19(b) factor—"whether a judgment rendered in the person's absence will be adequate." The third factor "refer[s] to the

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[5] Such a ruling would be consistent with well established domestic forfeiture law. The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, for example, provides that "[a]ll right, title, and interest in [forfeited] property * * * vests in the United States upon the commission of the act giving rise to forfeiture under this section." 18 U.S.C. 1963(c). See also 18 U.S.C. 981(f); 21 U.S.C. 853(c). Congress, in RICO, "devised a statutory remedial scheme that reaches *back to the time of the criminal acts* to forfeit property to the United States." *United States* v. *BCCI Holdings (Lux.), S.A.*, 46 F.3d 1185, 1191 (D.C. Cir.), cert. denied, 515 U.S. 1160 (1995).

public stake in settling disputes by wholes, whenever possible." *Provident Bank*, 390 U.S. at 111; see *Davis ex rel. Davis* v. *United States*, 343 F.3d 1282, 1292-1293 (10th Cir. 2003), cert. denied, 542 U.S. 937 (2004). That factor "promotes judicial economy by avoiding going forward with actions in which the court may end up rendering hollow or incomplete relief because of the inability to bind persons who could not be joined." 7 Wright & Miller § 1608, at 114.

Rather than focusing on "the public stake in settling disputes by wholes," the court of appeals considered only whether the judgment would be adequate to the "victims of the former president of the Republic" by satisfying a small portion of their $2 billion judgment. Pet. App. 9a. But, it is clear that the court's judgment would not satisfy "the public stake in settling disputes by wholes." Indeed, the court of appeals recognized that because "any judgment entered in this action cannot bind the Republic," the Philippines and PCGG "would remain free to sue for the Arelma assets in a forum of [their] choice." *Id.* at 8a. The court even suggested that "the Republic might seek the equivalent of the assets from their present holder, Merrill Lynch, in New York where they were invested." *Id.* at 8a-9a.

That reasoning directly contravenes the purposes of both Rule 19 and interpleader. This Court has noted that where multiple parties "assert conflicting claims to a common fund," a suit by any one of those parties "implicates all three of the interests that have traditionally been thought to support compulsory joinder of absent and potentially adverse claimants: the interest of the defendant in avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 737-738 (1977); see 7 Wright & Miller § 1618, at 274-275 ("When a particular fund

or property right is involved in litigation, federal courts must be especially sensitive to the danger of contradictory judicial orders relating to that fund or right.").

Interpleader is likewise intended to allow a party faced with multiple claims to a res to avoid multiple liability by resolving the controversy in a single consolidated proceeding. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 533 n.15, 534 n.16 (1967) ("the classic situation envisioned by the sponsors of interpleader" was one where the stakeholder was "faced with conflicting but mutually exclusive claims to a policy"); 7 Wright & Miller § 1702, at 534-535. As the court of appeals recognized in its earlier decision, "[w]ithout all significant claimants in an interpleader action, its purpose is materially frustrated." Pet. App. 41a.

4. As a number of courts have recognized, the fact that a party is absent due to its immunity from suit largely obviates the fourth factor in the Rule 19(b) analysis—"whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." "[T]he plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit." *Davis*, 343 F.3d at 1293-1294; see *Seneca Nation of Indians* v. *New York*, 383 F.3d 45, 48 (2d Cir. 2004), cert. denied, 126 S. Ct. 2351 (2006); *United States ex rel. Hall* v. *Tribal Dev. Corp.*, 100 F.3d 476, 480-481 (7th Cir. 1996); *Wichita & Affiliated Tribes*, 788 F.2d at 777. That is especially so in this case, because the Pimentel claimants assert an interest only as judgment creditors, not as persons claiming ownership of the assets, and because the vast majority of the Pimentel claimants are Philippine citizens who, as the court of appeals recognized, ordinarily "should find redress from their own government." Pet. App. 9a.

Indeed, the Ninth Circuit itself has repeatedly held that the lack of an adequate alternative remedy for a plaintiff is less significant when the absent party is immune from suit,

because the inability to bring suit is a "common consequence of sovereign immunity, and the [immune party's] interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *American Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1025 (2002); see *Wilbur* v. *Locke*, 423 F.3d 1101, 1115 (2005), cert. denied, 546 U.S. 1173 (2006); *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162, cert. denied, 537 U.S. 820 (2002); *Confederated Tribes of the Chehalis Indian Reservation* v. *Lujan*, 928 F.2d 1496, 1500 (1991).

Here, the court of appeals acknowledged that sovereign status of the absent party is a "powerful consideration" in indispensability analysis. Pet. App. 7a. However, contrary to its own circuit precedent, it placed heavy emphasis on the fact the Pimentel claimants would have "no forum within the Philippines open to their claims," *id.* at 10a, giving no consideration to the competing interest of the Philippines and PCGG in maintaining their sovereign immunity.

C. The Court Of Appeals' Decision Threatens To Impair The Nation's Foreign Policy Interests

The court of appeals' decision threatens to undermine significant interests of the United States. The United States has a strong interest in the proper application of principles of foreign sovereign immunity, a matter of great sensitivity in foreign relations both because of its impact on foreign states and because of the United States' own interests relating to reciprocity. See *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). More particularly, the United States has an interest in ensuring that property to which it has a significant claim will not be awarded to others by a foreign court that has no jurisdiction over the United States because of sovereign immunity. And the United States has an interest in cooperating with foreign governments in their efforts to repatriate assets misappropriated by their former leaders.

This case itself reflects such international cooperation in the agreement of the Swiss government and courts to transfer Marcos-related assets in Switzerland, including the Arelma bearer share certificates, to PNB to hold in escrow pending a determination by a Philippine court whether those assets are ill-gotten, and therefore forfeited. For a court in the United States, in effect, to nullify those proceedings by transferring the Arelma assets to Marcos creditors, without awaiting a determination whether the assets are, in fact, assets of the estate or of the Philippine government, frustrates the cooperative efforts of the Philippine and Swiss governments for an orderly procedure to repatriate the wealth stolen from the Philippines by its former leader. Indeed, the Swiss and Philippine governments have each expressed concern that the court of appeals' decision will undermine multilateral anti-corruption cooperation. See Pet. App. 65a-66a; No. 06-1204 Pet. Reply App. 1a-2a. Those concerns provide additional reason for this Court to review the court of appeals' decision.

II. THE COURT OF APPEALS CORRECTLY REJECTED THE ARGUMENTS OF THE ROXAS CLAIMANTS

The Roxas claimants contend that the probate exception divested the district court of jurisdiction to distribute the Arelma assets once it found that they were the property of the Marcos estate. But the probate exception has no application here. As this Court recently explained, the probate exception "precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court" and "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate." *Marshall* v. *Marshall*, 547 U.S. 293, 311-312 (2006). Here, the district court was not attempting to probate a will or administer an estate, and the assets from the Arelma securities account at Merrill Lynch are not in the possession of a state court, but are in the registry of the district court.

The Roxas claimants also contend that the district court lacked jurisdiction over the interpleader action because the Pimentel claimants were not "adverse" to the interpleaded fund. 06-1039 Pet. 19-20. However, 28 U.S.C. 1335(a)(1) requires only "[t]wo or more adverse claimants" to the fund to support jurisdiction. As the Roxas claimants acknowledge, there are at least two adverse claimants to that fund. 06-1039 Pet. 22. Moreover, the argument that the Pimentel claimants were not "adverse" to the fund because their claim is not based on a "direct tie" to the money (*id.* at 20) is incorrect; there is no need to establish a "direct tie" to have an "adverse" claim to an interpleaded fund, and the Roxas claimants do not cite any authority suggesting otherwise.

The Roxas claimants assert in passing that the Marcos estate was an indispensable party to the interpleader proceeding, and that therefore the case should be dismissed under Rule 19(b). It does not appear that that argument was fully briefed before the court of appeals. In any event, the premise of the argument is incorrect: Imelda Marcos and the Marcos estate were not absent within the meaning of Rule 19(b)—both were served with the interpleader complaint, but neither one made an appearance, and a default was entered against them. Pet. App. 44a; ER 38.

Nonetheless, if the Court grants the petition for a writ of certiorari in No. 06-1204, it should hold the petition in No. 06-1039, because, if the Court holds that the interpleader suit should be dismissed, reversal of the judgment below would affect the Roxas claimants as well.

CONCLUSION

The petition for a writ of certiorari in No. 06-1204 should be granted. The petition for a writ of certiorari in No. 06-1039 should be held pending disposition of No. 06-1204.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

JOHN B. BELLINGER, III
Legal Adviser
Department of State

MICHAEL S. RAAB
SARANG V. DAMLE
Attorneys

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